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VERMONT, SUPREME COURT

168
June 17

REPORTS

OF

c/

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

STATE OF VERMONT

BY

JOHN W. REDMOND

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A TABLE

OF THE

CASES REPORTED IN THIS VOLUME

Abbott v. Sanders et ux	179	Drown v. New England Telephone & Telegraph Co. and Consolidated Lighting Co. . .	1
Batchelder & Co. v. Wedge....	353	Dunlevy v. Fenton	505
Bigelow et al. (Town of Brookfield v.)	428	Farley (Collins v.)	144
Bolles (Zonetti v.)	345	Farwell (Davis v.)	166
Bolton v. Ovitt	362	Fenton (Dunlevy v.)	505
Bowers (In re)	175	Fertel v. Peck	351
Burlington Traction Co. (Strong v.)	34	Fife & Child (Cate v.)	404
Carpenter et al. (Royce v.)...	37	Flanders v. Mullin	124
Carr (Douglas v.)	392	Fleet v. Wait	177
Cate v. Fife & Child	404	Fletcher (Richardson v.)	510
Central Vermont Railway Co. (Smith v.)	208	Follensby et al. (Lee v.)	182
Childs (Watkins v.)	99	Furry's Admr. v. General Accident Ins. Co.	526
Church's Exr. v. Church's Est..	228	Grand Trunk Railway Co. (Place v.)	196
Clemons (Parker & Son v.)....	521	General Accident Ins. Co. (Furry's Admr. v.)	526
Cloyes et al. v. Middlebury Electric Company et al.	109	Gilmore (State v.)	514
Collins v. Farley	144	Hall v. Lawton et al.....	535
Conn. Valley Lumber Co. (Thibault v.)	333	Harrison's Admr. v. Northwestern Mut. Life Ins. Co.....	148
Consolidated Rendering Co. (In re)	55	Hassam (Reynolds v.)	501
Davenport v. Davenport	400	Hatch v. Reynolds's Est.	294
Davis v. Farwell	166	Hemenway (Lincoln v.)	530
Douglas v. Carr	392	Hendrick (Morgan v.)	284
Drouin v. Wilson	335	Hobart's Admr. v. Vail	152

Howard's Est. (In re).....	489	Parker & Son v. Clemons	521
Hubbard v. Rutland Railroad Co.	462	Parmalee (Snyder v.)	496
In re Henry A. Bowers	175	Peck's Est. (In re)	469
In re Consolidated Rendering Co.	55	Peck (Fertel v.)	351
In re Alice Howard's Est.	489	Peet (State v.)	449
In re Harriet C. Peck's Est.	469	Place v. Grand Trunk Railway Co.	196
In re Caroline W. Rogers's Will.	259	Post et al. v. Rutland R. R. Co.	551
Jaquith Co. v. Shumway's Est.	556	Preferred Accident Ins. Co. (Ward's Admr. v.)	321
Kiley v. Rutland R. R. Co.	536	Quinn v. Valiquette	434
Lawrence v. Rutland Railroad Co.	370	Reynolds v. Hassam	501
Lawton et al. (Hall v.)	535	Reynolds' Est. (Hatch v.) ...	294
Lee v. Follensby et al.	182	Richardson v. Fletcher	510
Lincoln v. Hemenway	530	Robinson v. St. Johnsbury & Lake Champlain R. R. Co.	129
Marsh v. Rutland R. R. Co.	397	Rogers' Will (In re)	259
Mason v. Ward et al.	290	Royce v. Carpenter et al.	37
Massucco v. Tomassi	186	Rutland Railroad Co. (Hubbard v.)	462
Mead v. Owen	273	Rutland R. R. Co. (Kiley v.) ..	536
Middlebury Electric Company et al. (Cloyes et al. v.)	109	Rutland Railroad Co. (Lawrence v.)	370
Morgan v. Hendrick	284	Rutland Railroad Co. (Marsh v.)	397
Mullin (Flanders v.)	124	Rutland Railroad Co. (Post et al. v.)	551
New England Telephone & Tele- graph Co. and Consolidated Lighting Co. (Drown v.)	1	Ryder (State v.)	422
Nicholas v. Nicholas' Est.	242	Sanders et ux. (Abbott v.) ...	179
North Troy Graded School Dist. v. Town of Troy et al.	16	Sargood (State v.)	412
Northwestern Mut. Life Ins. Co. (Harrison's Admr. v.)	148	Sargood (State v.)	415
Ovitt (Bolton v.)	362	Sheldon v. Wright	298
Owen (Mead v.)	273	Shumway's Est. (Jaquith Co. v.)	556
		Smith v. Central Vermont Rail- way Co.	208
		Snyder v. Parmalee	496
		Somerville (Wilkins v.)	48

CASES REPORTED.

VII

St. Johnsbury & Lake Champlain R. R. (Robinson v.)	129	Tudor v. Tudor	220
State v. Gilmore	514	U. S. etc. v. U. S. Fld. & Guar. Co.	84
State v. Peet	449		
State v. Ryder	422	Vall (Hobart's Admr. v.)	152
State v. Sargood	412	Valliquette (Quinn v.)	434
State v. Sargood	415		
State v. Webster	391	Wait (Fleet v.)	177
State v. Wilson	249	Ward's Admr. v. Preferred Ac- cident Ins. Co.	321
State v. Zonetti	348	Ward et al. (Mason v.)	290
Strong v. Burlington Traction Co.	34	Watkins v. Childs	99
Taft v. Taft	256	Webster (State v.)	391
Templeton (Wright v.)	358	Wedge (Batchelder & Co. v.) ..	353
Thibault v. Conn. Valley Lum- ber Co.	333	Wilkins v. Somerville et al.	48
Tomassi (Massucco v.)	186	Wilson (Drouin v.)	335
Town of Brookfield v. Bigelow et al.	428	Wilson (State v.)	249
Town of Ripton v. Town of Brandon	234	Wright (Sheldon v.)	298
Town of Troy et al. (North Troy Graded School Dist. v.)	16	Wright v. Templeton	358
		Zonetti v. Bolles	345
		Zonetti (State v.)	348

A TABLE

OF THE

CASES REPORTED IN THIS VOLUME ARRANGED BY COUNTIES.

ADDISON.		U. S. etc. v. U. S. Fid. & Guar.	
Abbott v. Sanders et ux.....	179	Co.	84
Cloyes et al. v. Middlebury Elec- tric Company et al.	109	Wilkins v. Somerville et al.....	48
Hubbard v. Rutland Railroad..	462	ESSEX.	
In re Caroline W. Roger's Will..	259	Place v. Grand Trunk Railway Co.	196
Mead v. Owen	273	State v. Wilson	249
Ripton v. Brandon.....	234	Thibault v. Conn. Valley Lumber Co.	333
BENNINGTON.		FRANKLIN.	
State v. Sargood	412	Bolton v. Ovitt	362
State v. Sargood	415	Morgan v. Hendrick et al.....	284
CALEDONIA.		State v. Gilmore	514
Drouin v. Wilson	335	Taft v. Taft	256
Lee v. Follensby & Peck.....	182	GRAND ISLE.	
Robinson v. St. Johnsbury & Lake Champlain R. R. Co.....	129	Watkins v. Childs	99
CHITTENDEN.		LAMOILLE.	
Collins v. Farley	144	Douglas v. Carr	392
In re Consolidated Rendering Co.	55	Hatch v. Reynolds's Est.	294
In re Harriet C. Peck's Est. ...	469	ORANGE.	
Mason v. Ward et al.	290	Smith v. Central Vermont Rail- way Co.	208
State v. Peet	449	Town of Brookfield v. Bigelow et al.	428
Snyder v. Parmalee	496		
Strong v. Burlington Traction Co.	34		

CASES REPORTED ARRANGED BY COUNTIES.

IX

ORLEANS.

Drown v. New England Telephone & Telegraph Co. and Consolidated Lighting Co....	1
North Troy Graded School Dist. v. Town of Troy et al.	16
Sheldon v. Wright	298

RUTLAND.

Flanders v. Mullin	124
Furry's Admr. v. General Accident Ins. Co.	526
Harrison's Admr. v. Northwestern Mut. Life Ins. Co.	148
Kiley v. Rutland Railroad Co..	536
Lawrence v. Rutland R. R. Co..	370
Marsh v. Rutland R. R. Co.	397
Parker & Sons v. Clemons....	521
Post et al. v. Rutland Railroad Co.	551
Quinn v. Valiquette	434
State v. Webster	391

WASHINGTON.

Batchelder & Co. v. Wedge....	353
Cate v. Fife & Child.....	404
Fertel v. Peck	351

Hobart's Admr. v. Vail	152
In re Henry A. Bowers	175
Massucco v. Tomassi	186
Nicholas v. Estate of Nicholas.	242
State v. Zonetti	348
Ward's Admr. v. Preferred Accident Ins. Co.	321
Wright v. Templeton	358
Zonetti v. Bolles	345

WINDHAM.

Davenport v. Davenport et al..	400
Dunlevy v. Fenton	505
Jaquith Co. v. Shumway's Est..	556
Lincoln v. Hemenway	530
State v. Ryder	422
Tudor v. Tudor	220

WINDSOR.

Church's Exr. v. Church's Est..	228
Davis v. Farwell	166
Fleet v. Walt	177
Hall v. Lawton et al.	535
In re Alice Howard's Est.	489
Reynolds v. Hassam	501
Richardson v. Fletcher	510
Royce v. Carpenter et al.....	37

A TABLE

OF THE

CASES CITED IN THE OPINIONS OF THE COURT.

Aiken v. Ballard, Rice Eq. 13....	107	Austin v. Austin, 9 Vt. 420.....	181
Aiken v. Smith, 21 Vt. 172.....	278	Austin v. Downer, 25 Vt. 558....	181
Alabama etc. Co. v. Aetna Ins.		Austin v. Tennessee, 179 U. S.	
Co. 35 So. 304.....	216	343	456
Alberti v. N. Y. etc. Co. 118 N. Y.		Ayer v. Ashmear, 31 Conn. 447..	139
77	217		
Allen's Admr. v. Allen's Admrs.		Babcock v. Collins, 60 Minn. 73.	227
79 Vt. 173	44	Bacon v. Bacon, 55 Vt. 243.....	25
Amazon Ins. Co. v. Partridge, 49		Baker v. Sherman, 75 Vt. 88....	509
Vt. 121	248	Baldwin v. Skeels, 51 Vt. 121..	278
Amey v. Long, 9 East 473.....	66	Ballman v. U. S. 200 U. S. 186..	77
Anderson v. Inland Telephone		Baltimore etc. R. Co. v. Baugh,	
etc. Co. 19 Wash. 575.....	15	149 U. S. 369.....	546
Anderson v. Ry. Co. 68 N. J.		Baltimore etc. R. Co. v. Mackey,	
Law 647	548	157 U. S. 72.....	548
Anderson v. Roberts, 18 Johns.		Baltimore etc. Co. v. Voight, 176	
515	223	U. S. 498	134
Anderson v. State, 22 Ohio 305..	517	Barber v. Essex, 27 Vt. 70.....	202
Andrews v. Marshall, 43 Me. 272.	223	Barden v. Crocker, 10 Pick. 383.	91
Apperson's Exr. v. Bolton, 29		Barnes v. Tenney, 52 Vt. 557....	278
Ark. 418	227	Barnett v. Crutcher, 3 Bibb. 202.	341
Archer v. N. Y. etc. Co. 106 N. Y.		Barnett v. Emery, 43 Vt. 178....	87
589	217	Bartlett v. Wilson, 59 Vt. 23....	81
Arlington Mfg. Co. v. Mears, 65		Bass v. Rublee, 76 Vt. 377.....	330
Vt. 414	248	Bates v. City of Hastings, 108	
Armstrong v. Colby, 47 Vt. 359..	247	N. W. 1005.....	106
Armstrong v. School Dist. 28 Mo.		Bates v. Old Colony R. R. 147	
App. 169	139	Mass. 255	134
Ashton v. Lord Exeter, 6 Ves.		Battell v. Matot, 58 Vt. 271.....	53
Jr. 288	104	Bausman v. Kelley, 38 Minn. 197.	46
Atchison etc. R. Co. v. Penfold,		Beckwith v. Houghton, 11 Vt.	
57 Kan. 148	547	602	63
Atkins v. Hatton, 2 Austr. 386..	103	Belsham v. Bush, 11 C. B. 191..	140
Atlantic Dock Co. v. Mayor, 53		Bemis v. C. V. Ry. Co. 58 Vt. 641.	204
N. Y. 64	139	Bender v. Fromberger, 4 Dall.	
Atty. Gen. v. Fullerton, 2 V. &		436	341
B. 264	105	Blackstone v. Miller, 188 U. S.	
Atty. Gen. v. Stephens, 6 De Gex,		189	494
M. & G. 111.....	104	Blake v. Blake, 70 Vt. 618.....	258

CASES CITED IN OPINIONS.

XI

Blanchard v. Sheldon, 43 Vt. 512.232	Cameron v. Abbott, 30 Ala. 416..106
Blank Jr. v. Ill. Cent. R. R. Co. 182 Ill. 332.....134	Campbell v. Fld. & Cas. Co. 109 Ky. 661529
Bleakly v. White, 4 Paige 654..139	Campbell v. Missouri Pac. Ry. Co. 121 Mo. 340.....216
Boone v. Eyre, 2 W. Bl. 1312....341	Campbell v. R. R. Co. 71 Ill. 611.107
Booth v. Wiley, 102 Ill. 84.....446	Canfield v. Andrews, 54 Vt. 1...116
Bonesteel v. Lynde, 8 How. (N. Y.) 226 72	Canfield v. Hard, 58 Vt. 217....447
Bosworth v. Bancroft, 74 Vt. 451.500	Carlin v. Ins. Co. 57 Md. 515....330
Bourne v. Bourne, 69 Vt. 251.... 44	Carlisle v. Cooper, 21 N. J. Eq. 576 48
Bowers v. R. Co. 162 Mass. 312.548	Carpenter v. McClure, 39 Vt. 9..223
Bowman v. Bradley, 17 L. R. A. 213281	Carpenter v. Willey, 65 Vt. 168..409
Boyden v. Fitch. R. R. Co. 72 Vt. 91203	Carr v. Manchester Electric Co. 70 N. H. 308..... 15
Boyle v. Wiseman, 29 Eng. L. & Eq. 473 73	Carrigan v. Ins. Co. 53 Vt. 418..325
Braceville Coal Co. v. The Peo- ple, 147 Ill. 66.....389	Carroll v. State, 63 Md. 551....518
Bradish v. Bliss, 35 Vt. 326....271	Carson v. Hawley, 82 Minn. 204.. 65
Bradish v. Gibbs, 3 Johns. Ch. 523225	Caulfield v. Sullivan, 85 N. Y. 153233
Bradley v. Phillips, 52 Vt. 517...525	Central Bridge Corporation v. Butler, 2 Gray 130.....150
Bredin v. Kingland, 4 Watts (Pa.) 420171	Chamberlain v. Chamberlain, 43 N. Y. 424233
Brenan v. Titusville, 153 U. S. 289459	Chamberlain v. Wilson, 12 Vt. 491 73
Brewer v. East Machias, 27 Me. 489241	Champion v. Brown, 6 Johns. Ch. 398 53
Brewer v. New York etc. R. R. 124 N. Y. 59.....136	Chapin v. Chicago etc. R. R. Co. 18 Ill. App. 47.....141
Briggs v. Nantucket Bank, 5 Mass. 94195	Chapman v. Mfg. Co. 13 Conn. 269123
Brokin v. Van Valen, 56 N. J. Law 85 27	Chatard, Bishop v. O'Donovan, 80 Ind. 20279
Brown v. Maryland, 12 Wheat. 419457	Chicago etc. v. Drainage Comrs. 20 U. S. 561..... 83
Brown v. Burrington, 36 Vt. 40..243	Churchill v. Cummings, 51 Mich. 446107
Brown v. Cambridge, 3 Allen 474.141	City of Logansport v. Uhl et al. 99 Ind. 531 46
Brown v. Houston, 114 U. S. 622457	City of Montpelier v. Senter, 72 Vt. 112 97
Brown v. Marsh, 7 Vt. 320....138	City Ry. Co. v. Citizens' St. R. R. Co. 166 U. S. 557..... 97
Brull v. Northwestern Mut. Re- lief Asso. 72 Wis. 433..... 89	Clark v. Assurance Co. 72 Vt. 458329
Budd v. N. Y. 143 U. S. 517....389	Clark v. Peck's Exrs. 79 Vt. 275.536
Budge v. Morgan etc. Co. 108 La. 349547	Clark v. Reyburn, 75 U. S. 318..403
Bull v. Loveland, 10 Pick. 9.... 66	Clement v. Graham, 78 Vt. 290..237
Burns v. Allen, 15 R. I. 32.....171	Cleavelands v. G. T. Ry. Co. 42 Vt. 449215
Cadigan v. Brown, 120 Mass. 493.119	Coe v. Errol, 116 U. S. 517....457
Calder v. Bull, 3 Dall. 388..... 96	Co. of Mobile v. Kimball, 102 U. S. 691457
Caldwell v. North Carolina, 187 U. S. 622457	

XII

CASES CITED IN OPINIONS.

Collins v. Ins. Co. 79 N. C. 279—330	Danville v. Sheffield, 50 Vt. 243. 241
Colquhoun v. Heddon, L. R. 25	Darling v. Clement, 69 Vt. 292.. 454
Q. B. D. 129..... 461	Dash v. Van Kleeck, 7 Johns. 477. 97
Com. v. Evans, 101 Mass. 25.... 414	Davenport v. Hubbard, 46 Vt. 200 466
Com. v. Boyd, 1 Iredell's Law N. C. 194 28	Davis v. R. Co. 55 Vt. 84..... 546
Com. v. Ellis, 160 Mass. 165.... 414	Dayton Iron Co. v. Barton, 183 U. S. 23 386
Com. v. Evans, 101 Mass. 25.... 517	Delaney v. Boston, 2 Har. 489... 123
Com. v. Hayes, 145 Mass. 289.... 517	Delashman v. Berry, 20 Mich. 292 444
Com. v. Nichols, 10 Met. 259.... 517	Delaware etc. Co. v. Conn, 50 Pa. St. 399 28
Com. v. Rooks, 150 Mass. 59.... 517	Delaware etc. R. Co. v. Salmon, 39 N. J. L. 299..... 218
Com. v. Stevens, 153 Mass. 421. 517	Dibblee v. Davison, 25 Ill. 486.... 89
Com. v. Wachendorf, 141 Mass. 270 517	Dillon v. Parker, 1 Swanst. 380. 487
Com. v. West Chester R. R. 3 Grant's Cases, Pa. 200..... 28	Disotell v. The Henry Luther Co. 90 Wis. 635..... 366
Comer v. Way, 107 Ala. 300.... 524	Dodge v. Dodge, 92 Mich. 109.. 180
Congdon v. Cahoon, 48 Vt. 52.... 499	Doe v. Kelley, 4 Dowl. Pr. 273.. 66
Conklin v. Egerton's Admr. 21 Wend. 430 225	Doe v. Jones, 10 B. & C. 459.... 225
Connor v. Trawick, 37 Ala. 289. 165	Dooner v. Canal Co. 164 Pa. St. 17 547
Conservators of River Tone v. Ash, 10 B. & C. 349..... 26	Dudley v. Seuthblne, 49 Ia. 650. 520
Cook v. Duckenfield, 2 Atk. 562. 225	Dufur v. Boston & Maine R. R. 75 Vt. 165 138
Cook v. Howland et al. 74 Vt. 393 79	Duke of Marlborough v. Godolphin, 2 Vezey 61..... 225
Cooley v. Board of Wardens, 12 How. 299 455	Dunbar v. C. V. Ry. 79 Vt. 474.. 297
Coolidge v. Ayers, 77 Vt. 448... 332	Dunklee v. Goodenough, 65 Vt. 257 509
Cooper v. Com. 106 Ky. 909.... 420	Durant v. Pratt, 55 Vt. 270.... 442
Cooper v. Gunn, 152 Ill. 471.... 180	Dutton v. Stoughton, 79 Vt. 361. 46
Corbin v. G. T. Ry. Co. 78 Vt. 458 207	Dye v. Dye, 13 Q. B. D. 147.... 480
Corson v. Dubois, 1 Holt N. P. 87 72	Eastman v. Green, 34 Vt. 387.. 138
Coryton v. Lithebye, 2 Saund. 115 120	Eaton v. R. Co. 163 N. Y. 391.. 547
Cowdry's Will, 77 Vt. 359..... 319	Edgecombe v. Rodd, 5 East. 294. 139
Cree v. Sherfy, 138 Ind. 354.... 181	Edwards v. Kearzey, 96 U. S. 595 95
Crocker v. Bellangee, 6 Wis. 645. 224	Edwards v. Morgan, McClell. 541 487
Cross v. Bartholomew, 42 Vt. 206. 561	Ellis v. Cleveland, 54 Vt. 437.... 361
Crusoe v. Butler, 36 Miss. 150.. 226	Ex Parte Fane, 16 Sim. 416, 39 Eng. Ch. 406 Am. Ed..... 480
Cumber v. Wane, 1 Smith's Lead. Cas. 325 139	Ex Parte Fuller, 2 Story 327.... 227
Cunningham v. Caldbeck, 63 Vt. 91 89	Fairbanks v. Devereaux, 58 Vt. 363 233
Curtis v. Rochester etc. R. R. Co. 18 N. Y. 534..... 368	Farmers' Mut. Ins. Co. v. Reynolds, 52 Vt. 405..... 248
Cutler v. Butler, 5 Fost. 343.... 480	Farrington v. Tennessee, 95 U. S. 679 97
Cutler & Martin v. Skeels, 69 Vt. 154 427	
Cutler v. Smith, 43 Vt. 577.... 172	
Daniels v. Hallenbeck, 19 Wend. 408 139	

<i>Ferre v. American Board of Comrs.</i> 53 Vt. 162.....	225	<i>Griffin v. Gibb</i> , 67 U. S. 519....	107
<i>Fieid v. N. Y. Cent. R. R. Co.</i> 32 N. Y. 339.....	216	<i>Griffith v. Hilliard</i> , 64 Vt. 646..	116
<i>Fid. & Cas. Co. v. Chambers</i> , 93 Va. 138	529	<i>Groveland v. Medford</i> , 1 Allen 23	241
<i>Fisher v. Bishop</i> , 108 N. Y. 25..	160	<i>Grymes v. Blofield</i> , 5 Cro. Ellz. 541	139
<i>Fisher v. Kimball</i> , 17 Vt. 323..	480	<i>Guice v. Barr</i> , 130 Ala. 570.....	105
<i>Fitts v. Cook</i> , 5 Cush. 596.....	486	<i>Gutridge v. R. R. Co.</i> 94 Mo. 468..	547
<i>Foot v. Edwards</i> , 3 Blatch. 310..	90	<i>Gutteridge v. Munyard</i> , 7 Car. & P. 129	343
<i>Ford v. Steele</i> , 54 Vt. 562.....	181	<i>Hackett v. Callender</i> , 32 Vt. 97..	442
<i>Ford v. Whitlock</i> , 27 Vt. 265....	122	<i>Hadley v. Cross</i> , 34 Vt. 586.....	36
<i>Foss v. Stanton</i> , 76 Vt. 365.....	343	<i>Hagar v. Reclamation Dist.</i> 111 U. S. 701	81
<i>Foster's Exr. v. Dickerson</i> , 64 Vt. 233	307	<i>Hale v. Henkel</i> , 201 U. S. 43....	66
<i>Frary v. Gusha</i> , 59 Vt. 257.....	307	<i>Hall v. DeCuir</i> , 95 U. S. 485....	457
<i>Fraser v. Ins. Co.</i> 71 Vt. 482....	325	<i>Hall v. Ins. Co.</i> 58 N. Y. 292....	330
<i>Frazier v. Miller</i> , 16 Ill. 482....	180	<i>Halstead v. Grinman</i> , 152 U. S. 412	46
<i>Freeland v. Freeland</i> , 102 Mass. 477	223	<i>Hannibal etc. Co. v. Huse</i> , 95 U. S. 465	457
<i>French Lumbering Co. v. Theriault</i> , 107 Wis. 627.....	223	<i>Hanks v. Chester</i> , 70 Vt. 273....	307
<i>Frorer v. The People</i> , 141 Ill. 171	389	<i>Hard v. R. Co.</i> 32 Vt. 473.....	546
<i>F. R. Patch Mfg. Co. v. Capelless</i> , 79 Vt. 1.....	94	<i>Hardin County v. Wright County</i> , 67 Iowa 127.....	241
<i>Frost v. Kellogg</i> , 23 Vt. 308....	278	<i>Harding v. Seeley</i> , 148 Pa. St. 20..	444
<i>Frost v. Spitley</i> , 121 U. S. 552..	446	<i>Harriman v. Swift</i> , 31 Vt. 385..	247
<i>Gay v. Horner</i> , 13 Pick. 535....	195	<i>Harris v. Harris</i> , 79 Vt. 22....	536
<i>George v. Bussing</i> , 15 B. Mon. 558	480	<i>Harrison v. Park</i> , 1 J. J. Marsh 170	341
<i>German v. R. R. Co.</i> 71 Vt. 414..	332	<i>Hart v. Hammond</i> , 18 Vt. 127..	326
<i>Gibson v. Holmes</i> , 78 Vt. 110....	361	<i>Hartigan v. Dickson</i> , 81 Minn. 284	141
<i>Gila Valley etc. v. Lyon</i> , 27 Sup. Ct. 145	203	<i>Harvey v. Varney</i> , 98 Mass. 120..	223
<i>Gillespie v. Forrest</i> , 18 Hun. 110..	120	<i>Hathaway v. Hathaway</i> , 44 Vt. 658	479
<i>Gleason v. Del. & Hud. etc. Co.</i> 65 Vt. 213	204	<i>Hathorn v. Richmond</i> , 48 Vt. 557	314
<i>Glocke v. Glocke</i> , 113 Wis. 303..	180	<i>Hayes v. Missouri</i> , 120 U. S. 68..	385
<i>Gloucester Ferry Co. v. Pennsylvania</i> , 114 U. S. 196.....	456	<i>Hayselden v. Staff</i> , 5 A. & E. 153	509
<i>Godfrey v. Littell</i> , 2 Russ. & Myl. 630	103	<i>Haywood v. Miller</i> , 3 Hill 90....	280
<i>Goodrich v. R. R. Co.</i> 116 N. Y. 398	547	<i>Haughwout v. Murphy</i> , 22 N. J. Eq. 531	53
<i>Gottlieb v. R. Co.</i> 100 N. Y. 462..	547	<i>Heath v. Cap. Sav. Bank</i> , 79 Vt. 301	447
<i>Gowen v. Glaser</i> , 3 Cent. Rep. 109	216	<i>Helden v. Hellen</i> , 45 Am. St. Rep. 375	446
<i>Grand Trunk Ry. Co. v. Richardson</i> , 91 U. S. 454.....	215	<i>Henderson v. Mayor of N. Y.</i> 92 U. S. 259.....	456
<i>Granite Works v. Bailey</i> , 69 Vt. 257	326	<i>Henderson v. Phil. etc. Ry. Co.</i> 144 Pa. St. 461.....	214
<i>Grant v. Bell</i> , 26 R. I. 288.....	180	<i>Henniquin v. Clews</i> , 111 U. S. 676	127
<i>Gregson v. Heather</i> , 2 Str. 727..	91		

Henry v. Tupper, 29 Vt. 358....	181	In re Consolidated Rendering	
Hess v. Newcomber, 7 Md. 325....	343	Co. 80 Vt. 55.....	386
Hill v. Featherstonebough, 7		In re Cowdry's Will, 77 Vt. 359..	269
Bing. 569	171	In re Ekstein, 148 Pa. St. 509...	72
Hinesburgh v. Sumner, 9 Vt. 23..	254	In re Freche, 6 Am. B. Rep. 479..	128
Hine v. Pomeroy, 39 Vt. 211....	98	In re Hickok's Est. 78 Vt. 259..	461
Hingeston v. Kelley, 18 L. J. N.		In re Polly Carey's Estate, 49 Vt.	
S. Ex. 360	151	236	480
Hodges v. Phelps, 65 Vt. 303....	233	In re Sammon, 79 Vt. 521.....	92
Hodgson v. The East India Co.		In re Varnum, 70 Vt. 147.....	481
8 T. R. 278.....	341	In re White's Will, 78 Vt. 479..	268
Hodsden v. Lloyd, 2 Bro. Ch.		Ins. Co. v. Bank Missouri, 71 Mo.	
534	480	58	443
Holden v. Hardy, 169 U. S. 366..	388	International etc. R. Co. v. Ker-	
Holloway v. Barton, 53 Vt. 300..	241	nan, 78 Tex. 294.....	547
Holmes v. Goldsmith, 147 U. S.		Jackson v. Pennsylvania R. R.	
150	426	Co. 66 N. J. L. 319.....	143
Holsman v. Boiling Spring		Jackson v. Spittal, L. R. 5 C P.	
Bleaching Co. 14 N. J. Eq. 335..	48	542	90
Hopping v. Quinn, 12 Wend. 517..	171	Jangraw v. Mee, 75 Vt. 211.....	332
Horan v. Thomas, 60 Vt. 325....	278	Janvrin v. Scammon, 29 N. H.	
Hoskinson v. Central Vt. Co. 66		280	73
Vt. 618	215	Jenkins v. Jenkins, 3 T. B. Mon.	
Hough v. R. R. Co. 100 U. S.		377	180
213	547	Johnson v. Goodyear Mining Co.	
Houston v. Brush, 66 Vt. 331....	546	127 Cal. 4	390
Houston v. Russell, 52 Vt. 110..	307	Johnson v. Jones, 44 Ill. 142....	97
Hoyt v. Hoyt, 77 Vt. 244.....	233	Johnson v. Shumway, 65 Vt. 389..	248
Hubbard v. Brainard, 35 Conn.		Johnson v. Smith, 78 Vt. 145....	93
563	97	Jones v. Broadhurst, 9 C. B. 173..	140
Hubbard v. Moore, 67 Vt. 532..	239	Jones v. Johnson, 10 Humph.	
Hubbard v. St. Louis etc. Co.		184	341
173 Mo. 249.....	140	Jones v. R. Co. 20 R. I. 210....	547
Hughes v. Overseers of Chatham,		Jones, Receiver v. Shaw, 16 Tex.	
5 M. & G. 54.....	278	Civ. App. 290.....	547
Hulbert v. Brigham, 56 Vt. 368..	170	Joyslin's Est. 76 Vt. 88.....	493
Humboldt Co. v. Lander Co. 26		Kellum v. Berkshire etc. Co. 101	
L. R. A. 749.....	104	Ind. 455	448
Hunt v. Hunt, 72 N. Y. 217....	195	Kelton v. Leonard, 54 Vt. 230..	259
Hunt v. Rublee, 76 Vt. 448....	278	Kentucky etc. Bridge Co. v. Hall,	
Hurtado v. California, 110 U. S.		125 Ind. 220.....	141
516	81	Kerrains v. People, 60 N. Y. 226..	280
Hutchinson et al. v. Howard et		Keyes v. Wood, 21 Vt. 331.....	499
al. 15 Vt. 544.....	170	Kimball v. Cross, 136 Mass. 300..	444
Hutchinson v. State, 33 Tex. Cr.		Kimball v. R. R. Co. 55 Vt. 95..	509
67	420	King v. Brigham, 18 L. R. A.	
Ilderton v. Ilderton, 2 Black. H.		361	104
145	90	King v. Cochran, 76 Vt. 141....	93
Imperial Gas Co. v. Broadbent,		King v. Stock, 2 Taunt. 340....	280
7 H. L. 600.....	48	Knowles v. Mitchell, 13 East.	
Inhabitants etc. v. Wood, 13		249	524
Mass. 193	26	Knoxville Iron Co. v. Harbison,	
In re Barney's Will, 70 Vt. 352..	269	183 U. S. 13.....	384

CASES CITED IN OPINIONS.

XV

Kollock v. Scribner, 98 Wis. 104.443	Luce v. Hassam, 76 Vt. 450....344
Koontz v. O. R. & N. Co. 20 Ore. 3216	Lund v. Inhabitants etc. 9 Cush. 36424
Kray v. Muggli, 54 L. R. A. 473..121	Lynde v. Davenport, 57 Vt. 597..499
LaFlam v. Miss. Pulp Co. 74 Vt. 136203	Lyndes v. Plymouth, 73 Vt. 216.307
Lake Shore etc. R. R. Co. v. Ohio ex rel. Lawrence, 173 U. S. 285.457	Lyon v. McLaughlin, 32 Vt. 423.116
Langdon v. Roane's Admr. 41 Am. Dec. 60.....523	Machen v. Hooper, 73 Md. 342..343
Lathrop v. Bampton, 31 Cal. 17.499	Mackin v. R. Co. 135 Mass. 201.548
Latromaille v. B. & M. R. R. 63 Vt. 336203	Magoun v. Ill. etc. Bank, 170 U. S. 283.....385
Lawrence v. Graves' Est. 60 Vt. 657307	Mahoney v. Bank etc. 4 Ark. 620. 28
Lazelle v. Newfane, 69 Vt. 306..329	Mahoney's Admr. v. R. Co. 78 Vt. 244546
Leavitt v. Morrow, 60 St. 71....140	Manufacturers' etc. Co. v. Dor- gan,* 7 C. C. A. 581.....528
Leddy v. Barney, 139 Mass. 394.140	Marbury v. Madison, 1 Cranch 137 95
Lee v. Tower, 124 N. Y. 370....233	Marcy v. Parker, 78 Vt. 73.....332
Leeds v. Strafford, 4 Ves. Jr. 180104	Maril v. Ins. Co. 95 Ga. 604....330
Laisy v. Hardin, 135 U. S. 100..455	Marquis of Bute v. Glamorgan- shire etc. 1 Ph. 681.....104
Leonard v. McArthur, 52 Vt. 439. 87	Marriot v. Badger, 5 Md. 306..488
Levy Court v. Coroner, 2 Wall. 501 27	Marsh v. Nash, 30 Vt. 76..... 89
Lewis v. Lewis, 4 Ore. 177.....108	Marston v. Hobbs, 2 Mass. 433..341
Lewis v. Roby, 79 Vt. 487.....259	Martin v. Courtney, 87 Minn. 197319
License Cases, 5 How. 504....456	Martin v. Hunter's Lessee, 1 Wheat. 305..... 95
Lily v. N. Y. Cen. etc. Co. 107 N. Y. 566.....203	Marx v. McGlynn, 88 N. Y. 358..232
Lindley v. Lindley, 68 Vt. 421..259	Mascott v. Ins. Co. 69 Vt. 116..330
Lindsay v. R. R. Co. 68 Vt. 556..332	Mason v. R. Co. 11 N. C. 482...547
Linsley v. Lovely, 26 Vt. 123...409	Matthews' Case, 1 Maddock 558.107
Lister v. Lane, 2 Q. B. 212....343	Matthews v. Lawrence, 1 Den. 213139
Lochner v. New York, 198 U. S. 45384	Matthews v. Missouri Pac. Ry. Co. 142 Mo. 645.....216
Lockwood Co. v. Lawrence, 77 Me. 297121	Matthewson v. Hoffman, 77 Mich. 420121
London v. Roberts, 20 Vt. 286.. 89	Mayor of Wilmington v. Ad- dicks, 44 Atl. 781.....107
Lonsdale v. Cook, 44 Atl. 929..119	McCulloch v. Maryland, 4 Wheat. 316 96
Lord v. Bigelow, 8 Vt. 445..... 26	McCutcheon v. People, 69 Ill. 606518
Louisiana v. Pillsbury, 105 U. S. 278 95	McDonald v. People, 126 Ill. 150.397
Louisville etc. R. Co. v. Bates, 146 Ind. 564547	McDowell v. McDowell's Est. 75 Vt. 401532
Louisville etc. Ry. Co. v. Keefer, 146 Ind. 21.....134	McGahey v. State of Va. 135 U. S. 662 95
Louisville etc. R. Co. v. Reegan, 96 Tenn. 128.....548	McGowan v. Griffin, 69 Vt. 168..326
Louisville etc. R. Co. v. Wil- liams, 95 Ky. 199.....547	McKane v. Marr & Gordon, 77 Vt. 7 15
Lovejoy v. Murray, 3 Wall. 1....142	McKinstry v. Collins, 74 Vt. 147.238
Low v. Rees Printing Co. 41 Neb. 127387	

Meech v. Est. of Meech, 37 Vt. 414	233	No. Pac. R. R. Co. v. Herbert, 116 U. S. 642.....	547
Merrill v. Englesby, 28 Vt. 150..	224	Nye v. Daniels, 75 Vt. 81.....	455
Messer v. Storer, 79 Me. 512....	106	Oard v. Oard, 59 Ill. 46.....	180
Metz v. Soule, 40 Iowa 230.....	141	Olmstead v. Loomis, 9 N. Y. 432..	116
Miller v. Warrington, 1 J. & W. 484	108	Olson v. O'Connor, 81 Am. St. Rep. 595	408
Millett v. The People, 117 Ill. 294	389	O'Neill v. N. Y. etc. Co. 115 N. Y. 579	218
Minn. etc. Ry. Co. v. Beckwith, 129 U. S. 26.....	385	Opinion of the Justices, 163 Mass. 589	390
Minn. etc. R. R. Co. v. Gano, 190 U. S. 557.....	380	Ordway v. Farrow, 79 Vt. 192....	53
Missouri etc. R. R. Co. v. Bar- ber, 44 Kan. 612.....	547	Orient Ins. Co. v. Daggs, 172 U. S. 557	383
Missouri etc. R. R. Co. v. Cham- bers, 17 Tex. Civ. App. 487....	541	Osborn v. Nicholson, 13 Wall. 654	96
Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205.....	385	Osborn & Woodbury v. Shawmut Ins. Co. 51 Vt. 278.....	79
Missouri etc. Ry. Co. v. McWher- ter, 59 Kan. 345.....	139	O'Shea v. New York etc. R. R. Co. 44 C. C. A. 601.....	141
Mitchell v. Clark, 110 U. S. 633..	95	Ottaquechee Sav. Bk. v. Holt, 58 Vt. 166	181
Mitchell v. State, 140 Ala. 118....	420	Ottaquechee Woolen Co. v. New- ton, 57 Vt. 451.....	47
Monahan v. Monahan, 77 Vt. 133..	150	Padbury v. Clark, 2 Macn. & G. 298	488
Monson v. Williams, 6 Gray 416..	241	Paige v. Canal etc. Co. 83 Cal. 84	123
Montgomery v. Board of Com. 76 Ind. 362.....	445	Palmer v. Village of St. Albans, 56 Vt. 519	202
Moon v. R. R. Co. 46 Minn. 106....	547	Patton v. Nixon, 33 Ore. 159.....	180
Morse v. Richmond, 42 Vt. 539....	307	Parker v. Nightingal, 6 Allen 341	119
Morrisette v. C. P. Ry. Co. 74 Vt. 232	203	Parker v. Parker, 69 Vt. 352.....	499
Morrisette v. C. P. Ry. Co. 76 Vt. 267	550	Park's Admr. v. American etc. Soc. 62 Vt. 19.....	232
Morton v. Onion, 45 Vt. 145.....	480	Patterson v. Patterson, 81 Iowa 626	180
Mott v. Consumer's Ice Co. 52 How. (N. Y.) Pr. 244.....	72	Payne v. Sheets, 75 Vt. 335.....	347
Moultonboro v. Tuftonboro, 43 N. H. 316.....	242	Peachy v. Harrison, 1 Salk. 77....	468
Moultrop v. Farmers' Mut. Ins. Co. 52 Vt. 123.....	181	Peacock v. Harris, 10 East 106....	524
Mullen v. Flanders, 73 Vt. 97....	314	Pearson v. French, 9 Vt. 349....	87
Munn v. Illinois, 94 U. S. 113....	389	Pearson v. Tower, 55 N. H. 36....	107
Murray v. Hay, 1 Barb. Ch. 59....	119	Peck v. Hoyt, 39 Conn. 9.....	180
Murray v. Mattison, 63 Vt. 479....	92	Pelton v. Place, 71 Vt. 430.....	448
New Jersey Steamboat Co. v. Brockett, 121 U. S. 637.....	424	Pendry v. Wright, 20 Fla. 828....	108
Newton v. Bronson, 13 N. Y. 587..	225	Penfield v. Penfield, 41 Conn. 474..	180
Newton v. Brown, 49 Vt. 16.....	332	People v. Com. 95 N. Y. 554.....	495
Nimblett v. Chaffee, 24 Vt. 628..	481	People v. Jackson, 111 N. Y. 362	217
Nixon v. Phelps, 29 Vt. 198.....	171	People v. Morris, 13 Wend. 325....	97
No. Pac. Cycle Co. v. Thomas, 26 Ore. 381.....	195	Perrine v. Dunn, 4 Johns. Ch. 140	403
No. Pac. R. R. Co. v. Babcock, 104 U. S. 190.....	547		

CASES CITED IN OPINIONS.

XVII

Perry v. Morse, 57 Vt. 509.....	195	Reg. v. Boyce, 1 Best & Smith	
Petit v. Com. 22 Ky. Law 262....	420	311	74
Phillips v. Kesterson, 154 Ill.		Reg. v. Garbett, 2 Car. & K. 474.	74
572	447	Register v. Hensley, 70 Mo. 189.	483
Pinney v. Fellows, 15 Vt. 525....	447	Reid v. Colorado, 187 U. S. 137..	456
Pironi v. Corrigan, 47 N. J. Eq.		Reid v. Gifford, Hopk. Ch. 416..	120
135	160	Republican etc. Co. v. State, 160	
Pitkin v. Burch, 48 Vt. 521.....	278	Ind. 379	390
Pitt v. Russell, 3 Lev. 19.....	341	Rexford v. Schofield, 101 Mich.	
Pittsburg etc. Co. v. Bates, 156		480	180
U. S. 577.....	455	Reynolds v. R. Co. 64 Vt. 66....	549
Pittsburg etc. Ry. Co. v. Maho-		Richmond's Appeal, 21 Am. St.	
ney, 148 Ind. 196.....	136	101	160
Plumer v. Ricker, 71 Vt. 114....	307	Richter v. Richter, 111 Ind. 456.	181
Polindexter v. Greenhow, 114 U.		Riker v. Hooper, 35 Vt. 457.....	420
S. 270	95	Rioux v. Ryegate Brick Co. 72	
Pope v. Henry, 24 Vt. 560.....	447	Vt. 148	326
Pope v. Savings Bank, 56 Vt.		Rising v. Cummings, 47 Vt. 345.	172
284	232	Ritchie v. The People, 155 Ill.	
Poplin v. Hawk, 8 N. H. 305....	241	98	387
Posnett v. Marble, 62 Vt. 481....	195	Robbins v. Shelby Co. Taxing	
Potter v. Saunders, 6 Hare 1....	53	Dist. 120 U. S. 489.....	457
Powers v. Ins. Co. 68 Vt. 396....	524	Roberts v. Vest, 126 Ala. 355....	116
Prader v. Natl. Masonic Accl.		Robeson v. Pittenger, 2 N. J. Eq.	
Asso. 95 Iowa 149.....	529	57	116
Pratt v. Rice, 7 Cush. 209.....	225	Robinson v. Raley, 1 Bur. 316....	133
Purdy v. Est. of Purdy, 67 Vt. 50.	231	Robinson v. Wilson, 22 Vt. 35....	421
Quinn v. Quinn, 16 Vt. 426.....	421	Roby v. Cossitt, 78 Ill. 638.....	107
Rafferty v. Traction Co. 147 Pa.		Ronkendorff v. Taylor's Lessee,	
St. 579	119	4 Pet. 349	240
Railroad Tax Cases, 13 Fed. 722.	386	Rooney v. Soule, 45 Vt. 303....	448
Railroad Co. v. Garrison, 81 Miss.		Roosevelt v. Heirs of Fulton, 7	
257	121	Cow. 71	341
Railroad Co. v. Harrell, 58 Ark.		Rowell v. Fuller, 59 Vt. 688....	427
454	36	Royce v. Maloney, 58 Vt. 437....	147
Railway Co. v. Keys, 55 Kan.		Royce v. Maloney, 58 Vt. 437....	399
205	121	Sammon's Case, 79 Vt. 521.....	176
Ramsey v. The People, 142 Ill.		Sargent v. Burton, 74 Vt. 24....	44
380	389	Sargent v. School Dist. 63 N. H.	
Randolph v. Woodstock, 35 Vt.		528	32
291	307	Sawyer v. Merrill, 10 Pick. 16....	414
Ranlett v. Cook, 44 N. H. 512....	443	Sawyer v. No. Am. Life Ins. Co.	
Ranney v. St. J. & L. C. R. R.		46 Vt. 697.....	92
Co. 67 Vt. 594.....	194	Scaltock v. Harston, Law Rep. 1	
Rayley v. Best, 1 Russ. & Myl.		C. P. 106	448
659	105	Schollenberger v. Pennsylvania,	
Raymond v. Sturges, 23 Conn.		171 U. S. 1.....	466
146	133	Schofield's Admr. v. Ins. Co. 79	
Rea v. Harrington, 58 Vt. 190....	396	Vt. 161	329
Read v. Brown, 22 Q. B. D. 128..	89	Scott v. Brest, 2 T. R. 238.....	91
Reed v. Peterson, 91 Ill. 288....	160	Scott v. Hull, 8 Conn. 296.....	341
Reeder v. Reeder, 89 Ky. 529....	180	Seiber v. Amanson, 78 Wis. 679.	139
		Seither v. Philadelphia Traction	
		Co. 125 Pa. St. 397.....	140

Shader v. Ry. Pass. Assurance Co. 3 Hun. 424.....	529	State v. Denoon, 31 W. Va. 122.....	520
Shaffer v. Union etc. Co. 55 Md. 74	390	State v. Duncan et al. 78 Vt. 364	75
Shannon v. Sanford Co. 70 Conn. 573	138	State v. Flint, 60 Vt. 304.....	218
Shipman v. Furniss, 69 Ala. 555.	160	State v. Franklin etc. Co. 74 Vt. 246	92
Sias v. Consolidated Lighting Co. 73 Vt. 35.....	15	State v. Goodwill, 33 W. Va. 179.	388
Simpson v. Eggington, 10 Exch. 844	140	State v. Hartfel, 24 Wis. 60.....	518
Sinking Fund Cases, 99 U. S. 70.	381	State v. Hodgson, 66 Vt. 134....	81
Slayton v. Inhabitants of Chees- ter, 4 Mass. 478.....	87	State v. Housekeeper, 70 Md. 162.	318
Smith v. Allen, 21 Am. Dec. 33....	107	State v. Intoxicating Liquors, 44 Vt. 208	238
Smith v. Bailey, 10 Vt. 163.....	403	State v. Keyes, 8 Vt. 57.....	253
Smith v. Baker, A. C. 325.....	13	State v. Kittelle, 110 N. C. 560....	517
Smith v. London etc. Co. L. R. 6 C. P. 14.....	218	State v. Loomis, 115 Mo. 307....	389
Smith v. Potter, 46 Mich. 258....	548	State v. Marsh, 70 Vt. 288.....	307
Smith v. Youmans, 37 L. R. A. 285	121	State v. Newell, 71 Vt. 476.....	194
Soltau v. De Held, 2 Sim. 133....	116	State v. Peach, 70 Vt. 283.....	332
Sowles v. Carr, 69 Vt. 414.....	332	State v. Perkins, 42 Vt. 399....	516
Sowles v. Martin et al. 76 Vt. 180	278	State v. Potter & Wife, 42 Vt. 495	259
Sowles' Admr. v. Sartwell, 76 Vt. 70	45	State v. Pratt, 59 Vt. 590.....	457
Soper v. Manning, 147 Mass. 126.	171	State v. Scargood, 77 Vt. 80.....	550
Southwestern Coal etc. Co. v. McBride, 185 U. S. 499.....	97	State v. Scarpini, 77 Vt. 92.....	461
Spaulding v. Warner's Est. 52 Vt. 29	231	State v. Shaw, 73 Vt. 149.....	247
Speer v. Cawter, 2 Mer. 410.....	103	State v. Shortell, 93 Mo. 123.....	517
Spread v. Morgan, 11 H. L. Cas. 583	488	State v. Spaulding, 60 Vt. 228....	238
Sprigg's Admr. v. Rutland R. R. Co. 77 Vt. 347.....	133	State v. Stimpson, 78 Vt. 124....	80
Standard etc. Ins. Co. v. Jones, 94 Ala. 434.....	529	State v. Thader, 43 Minn. 253....	75
Stanton v. Miller, 58 N. Y. 192....	52	State v. Tomassi, 67 Vt. 312.....	510
Stark v. Thompson, 3 Mon. 296....	142	State v. Wetherell, 70 Vt. 274....	309
State v. Abraham, 78 Vt. 53.....	461	Stearn v. Clifford, 62 Vt. 92.....	332
State v. Adams, 72 Vt. 253.....	414	Stevenson v. Gunning's Est. 64 Vt. 601	150
State v. Ackerly, 79 Vt. 69.....	516	Stickney v. Maidstone, 30 Vt. 738	206
State v. Bean, 74 Vt. 111.....	288	Stickney v. Parmenter, 74 Vt. ' 58	127
State v. Brink & Gibbs, 68 Vt. 659	258	Stiles v. Brown, 16 Vt. 563.....	519
State v. Brown etc. Co. 18 R. I. 16	387	Stiles v. Windsor, 45 Vt. 520....	63
State v. Camley, 67 Vt. 322.....	419	Stillwell v. Farwell, 64 Vt. 286....	561
State v. Caywood, 96 Iowa 367....	420	St. Louis etc. Co. v. Lowder, 138 Mo. 533	195
State v. Cazeaux, 8 Mart. 318....	421	St. Louis etc. Ry. v. Paul, 173 U. S. 404	378
State v. Dana, 59 Vt. 614.....	259	St. Luke's v. St. Leonard's, 1 Bro. Ch. 40.....	103
State v. Davis, 52 Vt. 376.....	392	Stone v. Tupper, 58 Vt. 409.....	532
		Strafford v. Powell, 1 Ball and B. 1	487
		Stramberg v. Heckman, Busbee's N. C. Rep. 250.....	89
		Strobel v. Salt Co. 164 N. Y. 303.	120
		Strong v. Slicer, 35 Vt. 40.....	532
		Sturgis v. Hull, 48 Vt. 302.....	98

CASES CITED IN OPINIONS.

XIX

Sumner v. Sumner, 36 Vt. 105.. 89	Turner v. Hart, 71 Mich. 128.. 48
Sutherland v. Standard etc. Ins. Co. 87 Iowa 505.....529	Turner v. Hitchcock, 20 Iowa 310139
Sutton v. Bishop, 4 Burr. 2283..467	Turpin v. Lemon, 187 U. S. 51.. 81
Sutton Hospital, 10 Co. 23..... 26	
Tarr v. Robinson, 158 Pa. St. 62.232	Underhill v. Jericho, 66 Vt. 183..247
Taylor v. Needham, 2 Tenn. 279.341	Union Pac. R. R. Co. v. Daniels, 152 U. S. 684.....546
Taylor v. Stibbert, 2 Ves. Jr. 438 53	Union etc. Co. v. Goodwin, 57 Neb. 138547
Ten Eick v. Simpson, 1 Sandf. Ch. 244 53	U. S. v. Butler, 38 Fed. 498.....420
Tex. etc. R. R. Co. v. Archibald, 170 U. S. 665.....548	U. S. v. Cox, 18 How. 100..... 92
Tex. etc. R. R. Co. v. Barrett, 166 U. S. 617.....546	U. S. Express Co. v. Henderson, 69 Iowa 40 67
Thatcher v. Lyons, 70 Vt. 438..233	U. S. Fid. etc. Co. v. U. S. 204 U. S. 349..... 91
Thayer v. Cen. Vt. Ry. Co. 60 Vt. 214259	U. S. v. Kimball, 117 Fed. 156.. 72
The Mayor etc. of London v. Cole, 7 T. R. 583..... 91	U. S. v. Quincy, 4 Wall. 535.... 94
Thomas v. Dakin, 22 Wend. 9... 28	U. S. v. U. S. Fid. & Guar. Co. 78 Vt. 445 92
Thomas v. Central R. R. Co. 194 Pa. St. 511.....141	U. S. v. Wilson, 118 U. S. 86....446
Thomas v. Quartermaine, 18 Q. B. D. 685 13	U. S. v. Wiltberger, 5 Wheat. 76.253
Thompson, Trustee v. Fairbanks, 75 Vt. 361357	Van Epps v. Van Epps, 9 Paige 237160
Thornton's Exrs. v. Thornton's Heirs, 39 Vt. 163.....272	Vaughan v. Northrup, 15 Pet. 1. 92
Thruswell v. Handyside, 20 Q. B. D. 359 13	Vaughn v. Law, 1 Humph. 123..116
Tilt v. Kelsey, 207 U. S. 43.....493	Village of Carthage v. Freder- ick, 122 N. Y. 268 83
Tinker v. Colwell, 193 U. S. 473.127	Vt. & Can. R. R. Co. v. Cen. Vt. Ry. Co. 63 Vt. 1.....457
Tomlinson v. Jessup, 15 Wall. 454380	Wake v. Conyers, 1 Eden 331...103
Tompkins v. Clay Hill St. R. R. Co. 66 Cal. 163.....140	Waldele v. New York etc. R. R. Co. 95 N. Y. 274.....424
Torrey v. Field, 10 Vt. 353.....133	Walker v. Whitehead, 16 Wall. 314 94
Townson v. Tickell, 3 Barn. & Ald. 31232	Walling v. Michigan, 116 U. S. 446457
Tracy v. R. R. Co. 76 Vt. 313..329	Walsh v. Trustees etc. 96 N. Y. 427 29
Travelers Ins. Co. v. Harvey, 82 Va. 949529	Walsingham v. Comb. 1 Lev. 183.341
Trestegge v. Benevolent Soc. 92 Ind. 82445	Walton v. Dickerson, 7 Pa. St. 376169
Tribette v. Railroad Co. 70 Miss. 185118	Walton v. Westwood, 73 Ill. 125.106
Trimble v. Am. etc. Co. 48 Atl. 912106	Ward v. Church, 66 Vt. 490....482
Troy etc. R. R. Co. v. Potter, 42 Vt. 265555	Wardell v. McConnell, 25 Neb. 558139
Tubbs v. Tukey, 3 Cush. 438...362	Washington etc. R. R. Co. v. McDade, 135 U. S. 554.....546
Tunbridge Will Case, 2 Wils. 423120	Waterman v. Buck, 58 Vt. 519..117
	Watkins v. Childs, 80 Vt. 99....441
	Watson v. Smith, 7 Ore. 448...180
	Weeks v. Prescott, 54 Vt. 318..248
	Welch v. Miller, 70 Vt. 108.....172

XX

CASES CITED IN OPINIONS.

Wellington v. Kelley, 84 N. Y. 547	140	Whitridge v. Parkhurst, 20 Md. 62	488
Wells v. Austin, 59 Vt. 157.....	46	Whitton v. State, 37 Miss. 379..	518
Welton v. Missouri, 91 U. S. 275.	456	Wilfong v. Johnson, 41 W. Va. 283	180
West v. State, 1 Wis. 209.....	68	Willard v. Wing, 70 Vt. 123....	278
Western Tube Co. v. Zang, 85 Ill. App. 63	141	Willis v. Jernegan, 2 Atk. 251..	524
Wheeler v. Alton, 68 N. H. 477..	32	Willmarth v. Pratt, 56 Vt. 474..	278
Wheeler v. Campbell, 68 Vt. 98.	442	Wood v. Wand, 3 Ex. 779.....	121
Wheeler v. Ins. Co. 62 N. H. 450.	330	Woodbury v. Short, 17 Vt. 387..	122
Whipple v. Fairhaven, 63 Vt. 221.	116	Woodruff v. Parham, 8 Wall. 123.	459
White v. Lumiere etc. Co. 79 Vt. 206	550	Woodward v. James, 115 N. Y. 346	232
Whithead v. Moore, 5 Moore 105.	524	Woodward v. Seeley, 50 Am. Dec. 452	118
Whitehead v. Shattuck, 138 U. S. 146	446	Wooley v. Edson, 35 Vt. 214....	46
Whitemarsh v. Ins. Co. 16 Gray 359	330	Wilson v. Mitchell, 101 Pa. St. 495	160
Whitewell v. Willard, 1 Metc. 216	523	Wing v. Hall, 44 Vt. 118.....	448
		Wright v. Bates, 13 Vt. 341.....	447
		Wyman v. U. S. 109 U. S. 654..	92

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF VERMONT.

CHAUNCEY DROWN v. NEW ENGLAND TELEPHONE AND TELE-
GRAPH CO. AND CONSOLIDATED LIGHTING CO.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, HASELTON, and POWERS, JJ.

Opinion filed May 10, 1907.

*Tort Feasors—Joint and Several Liability—Negligence—Elec-
tricity—Liability for Injuries—Care Required—Telephone
Companies—Master and Servant—Injuries to Servant—
Assumption of Risk and Contributory Negligence—Plead-
ing—Required Averment Implied.*

Liability as joint tort feasors may arise from unintentional as well as from intentional wrongs.

It is not necessary to liability as joint tort feasors that there should have been "actual concert" of action as distinguished from "passive concert," nor "actual community" of design as distinguished from "passive community."

Where two persons owe to a third person separate duties, although differentiated by the relations they severally sustain to him, but primary and not secondary as between themselves, and each neglects to perform his duty, though with neither *actual* concert of action nor community of design, and their neglects concur to produce a single injury that would not have happened without such

concurrence, each is liable for the whole damage, and they may be sued jointly or severally at the election of the party injured.

A pleader need not affirmatively allege what is necessarily implied in what he does allege.

Where the declaration alleges that defendant placed and maintained its electric wires in such close proximity to the top of a telephone pole on which plaintiff had to work that he was injured by the current, such injury is *prima facie* evidence that defendant is liable therefor, and as it is an irresistible inference from what is alleged that electricity escaped in consequence of imperfect insulation, that fact need not be affirmatively alleged.

Where it appears that defendant has *prima facie* violated its duty to plaintiff and thereby injured him, defendant is liable unless plaintiff contributed to the accident by his own negligence, or voluntarily encountered the danger after he actually or presumably knew and comprehended it.

Mere knowledge of a risk does not necessarily involve consent thereto, for that would be saying *scienti non fit injuria*; whereas the maxim is, "*volenti non fit injuria*."

A telephone company as much owes its lineman the duty to remedy a dangerous condition of its lines caused by the proximity of another company's electric wires, as though it had itself created that condition.

The danger to a telephone lineman incident to the proximity of electric wires belonging to another company is an extraordinary risk, and was not assumed by him unless either he knew and comprehended it, or it was so plainly observable that he would be taken to have known and comprehended it.

Sias v. Consolidated Lighting Co., 73 Vt. 35, and *McKane v. Marr & Gordon*, 77 Vt. 7, distinguished; and *Morrisette v. Canadian Pacific Ry Co.* followed.

Where a telephone lineman, injured by an electric current while working at the top of a pole in close proximity to a line of electric wires belonging to another company, had never before seen anybody working thereon, and had never been told, and did not know, that it was in dangerous proximity to the electric wires, the danger was not so plainly observable that he can be said, as matter of law, to have assumed the risk, nor to have been guilty of contributory negligence.

It is not decided whether there is any difference between assumption of risk and contributory negligence.

CASE for negligence, Orleans County. Heard at Chambers in vacation after March Term, 1906, *Watson, J.*, presiding, on defendants' several demurrers to the declaration. Demurrers overruled, declaration adjudged sufficient. The defendants excepted. Cause passed to the Supreme Court before trial on the merits. The opinion fully states the case.

Henry W. Dunn for the New England Telephone & Telegraph Co.

It was in cases of *intentional* wrongs that the law of joint tort feorsors was formulated, and after the analogy of the law as to joint contractors, actual concert of action and community of design was required to effect joint liability for a tort. *Adams v. Hall*, 2 Vt. 9; *Stoughton v. Mott*, 15 Vt. 162; *Wall v. Osborn*, 12 Wend. 39; *Williams v. Sheldon*, 10 Wend. 654; *Nicoll v. Glennie*, 1 Maule & Sel. 588; Cooley, Torts, 133; *Atkin v. Slater*, 1 Car. & K. 356; Dicey, Parties, 436; *Bonte v. Postel*, 109 Ky. 64, 51 L. R. A. 187; *Little etc. Co. v. Richards*, 57 Pa. St. 142; *Bard v. Yohn*, 26 Pa. St. 482; *Guille v. Swan*, 19 Johns. 381.

The subsequent great number of accident cases based upon negligence, resulting from the introduction of railroad and street railway companies and other corporate enterprises, presented a wholly new class of questions. Some courts have held to the old test, treating the defendants as joint wrongdoers only when the negligence of all was connected with some common enterprise, or consisted in the neglect of a joint duty. *Butler v. Ashworth*, 110 Cal. 614; *Smith v. Day*, 39 Ore. 531; *Weisenberg v. Winneconne*, 56 Wis. 667; *Oakes v. Spaulding*, 40 Vt. 347.

Other courts go to the other extreme and hold negligent defendants jointly liable in all cases where the negligence of all has contributed to the same injury to the plaintiff.

But where, as here, the duties that the joint defendants are alleged to have violated are wholly different in character; where the defendants stand in wholly different relations to the plaintiff; where the defences available to them are distinct,

based upon wholly different principles, the danger of confusing the jury with evidence and instructions applicable to one defendant and not to another, and the resulting risk of injustice either to the plaintiff or to some or all of the defendants, constitute a sufficient objection to the joinder of such causes of action. *Mooney v. Edison Elec. etc. Co.*, 185 Mass. 547; *Fletcher v. B. & M. R. R. Co.*, 187 Mass. 463.

The risk of the wire was obvious and hence assumed by plaintiff. The defendants had a right to assume that warning was unnecessary. *LaFlam v. Missisquoi Pulp Co.*, 74 Vt. 125; *Meehan v. Holyoke St. Ry. Co.*, 186 Mass. 511; *Miss. River Logging Co. v. Schneider*, 74 Fed. 195; *Junior v. Elec. Lt. & Power Co.*, 127 Mo. 79; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496; *Skinner v. C. V. Ry. Co.*, 73 Vt. 336; *Williamson v. Sheldon Marble Co.*, 66 Vt. 427; *Latremouille v. Bennington etc. Co.*, 63 Vt. 336; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Anderson v. Inland etc. Co.*, 19 Wash. 575; 4 Thompson, Comm. Negl. 2d Ed. §4609; *Dumas v. Stone*, 65 Vt. 442; *Kilpatrick v. Grand Trunk Ry.*, 74 Vt. 288; *Foley v. Jersey City Elec. Light Co.*, 54 N. J. L. 411; *Lamotte v. Boyce*, 105 Mich. 545; *Ragon v. Toledo etc. Co.*, 97 Mich. 265; *Texas, etc. Co. v. Rogers*, 57 Fed. 378; *Kennedy v. Hingham Cordage Co.*, 168 Mass. 278; *McIsaac v. Northampton Elec. Ltg. Co.*, 172 Mass. 89; *Windover v. Troy City Ry. Co.*, 4 N. Y. App. Div. 202; *Denver Tramway Co. v. Nesbit*, 22 Colo. 408; *Louisville etc. Co. v. Corps*, 124 Ind. 427; *Jergenson v. Smith*, 32 Minn. 79; *Jennings v. Tacoma etc. Co.*, 7 Wash. 275.

Plaintiff was guilty of contributory negligence. If he had looked he could have seen the danger. *Law v. Central Dist. etc. Co.*, 140 Fed. 558; *Moore v. East Tenn. etc. Co.*, 142 Fed. 965; *Columbus R. R. Co. v. Dorsey*, 119 Ga. 363; *Whelton v. West End etc. Co.*, 172 Mass. 555.

Hunton & Stickney for the Consolidated Lighting Co.

Plaintiff must be confined to proof of the negligence alleged in his declaration, which is only that the Consolidated Lighting Co. placed its wires above the wires of the Telephone Co. and within twenty-seven inches thereof. Danger arises only when, because of defective insulation, electricity escapes, and proof of

the proximity of the wires of the two defendants, without other evidence of the cause of the injury, is not sufficient to show the Consolidated Lighting Co. guilty of actionable negligence. *Keasby on Electric Wires* §250.

The duty arising from the contractual relations between master and servant did not exist between plaintiff and the Consolidated Lighting Co. That defendant could be liable to plaintiff only for injury caused by its negligence, when plaintiff was in the exercise of ordinary care. *Carr v. Electric Co.*, 70 N. H. 308; *Bergin v. Southern etc. Co.* 70 Conn. 54, 67.

The question is whether the injury which followed the act or omission complained of, namely, the proximity of the wires, was the natural and probable consequence of such proximity in the sense that a prudent man ought to have foreseen it. *Morrisette v. R. R.*, 74 Vt. 232, 242; *Corbin v. R. R.*, 78 Vt. 458. But the close proximity of lighting wires and other electric wires is known to every one, it is a matter of common observation. As between his employer, the New England Telephone & Telegraph Co., and himself, plaintiff undertook his employment with the knowledge of the existence of such dangers, and was bound to exercise care to avoid the consequences thereof. *Junior v. The Missouri etc. Co.*, 127 Mo. 79; *Dixon v. West. Union Tel. Co.*, 68 Fed. 630.

W. M. Wright, Frank D. Thompson, and J. W. Redmond
for the plaintiff.

The Consolidated Lighting Company is clearly liable. The duty of electric companies, which maintain their lines in the streets, towards the public generally, and persons lawfully using the streets, and the duty of such companies towards those persons whose legal duties bring them in close proximity to their electric wires, has frequently been discussed by the courts, and the rule is, that electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus and will be responsible for any conduct falling short of that standard; that the care varies with the danger which will be incurred by negligence; that in cases where the wires carry a strong current of electricity dangerous to human life, and the result of negligence might be exposure to death or most serious accidents, then "reasonable care" means the highest

degree of care possible in the circumstances. *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692; *Giraudi v. Electric etc. Co.*, 107 Cal. 120; *Ennis v. Gray*, 87 Hun. 355; *Haynes v. Raleigh Gas Co.*, 114 No. Car. 203; *City Electric Ry. Co. v. Conery*, 61 Ark. 381; *Ugla v. West End etc. Co.*, 160 Mass. 351; *Huber v. LaCrosse City Ry. Co.*, 92 Wis. 636, 53 Am. St. Rep. 940; *Rowe v. Taylorville Electric Co.*, 17 Am. Neg. Rep. 215; *Perham v. Portland Electric Co.*, 33 Ore. 451, 72 Am. St. Rep. 730; *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922; *Brown v. Edison Electric Ill. Co.*, 90 Md. 400, 78 A. St. Rep. 442; *Fitzgerald v. Edison Electric etc. Co.*, 200 Pa. St. 540, 86 Am. St. Rep. 732; *Mitchell v. Raleigh Electric Co.*, 129 N. C. 166, 85 Am. St. Rep. 735; *McAdam v. Central Railway etc. Co.*, (Conn.) 35 Atl. 341; *Reagan v. Boston Electric Light Co.*, 167 Mass. 406, 45 N. E. 743; *McLaughlin v. Louisville etc., Co.*, 18 Ky. Law. Rep. 693; *Illingsworth v. Boston Electric etc. Co.*, 161 Mass. 583, 37 N. E. 778; *Anderson v. Jersey City etc. Co.*, 63 N. J. L. 387, 43 Atl. 654; *Neward Electric etc. Co. v. Garden*, 78 Fed. 74; *Fassett v. Town of Roxbury*, 55 Vt. 552; *McGovern v. Smith & Hays*, 73 Vt. 52.

Again, the defendant, Consolidated Lighting Company, owed the plaintiff the duty to use the greatest care in the construction and maintenance of its electrical line. The plaintiff, while in the proper discharge of his duties as a lineman, came in contact with said defendant's electrical line, and was injured. Contributory negligence on the part of the plaintiff is expressly negatived. The law, therefore, presumes that the accident arose from the negligence of the Consolidated Lighting Company in the construction and maintenance of its said electrical line, *res ipsa loquitur*. *Houston v. Brush*, 66 Vt. 331; *Western Union Tel. Co. v. State*, 82 Md. 293, 51 Am. St. Rep. 464; *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 Am. St. Rep. 146.

The New England Telephone & Telegraph Company is also liable. It is elementary that the master not only personally owes to his servant the duty of using ordinary care and diligence to provide a reasonably safe place in which to work, but he is also bound to make a reasonably careful inspection of the premises, machinery, tools and appliances which he provides for the use of his servants, from time to time, to the end that they shall not be used by his servants after they become de-

fective in such a sense as to be dangerous. 4 Thompson, Neg. §3786; *Dumas v. Stone*, 65 Vt. 442; *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, 52 L. R. A. 437; *Hammond Co. v. Mason*, 12 Ind. App. 469, 40 N. E. 642; *Comben v. Belleville Stone Co.*, 59 N. J. L. 226, 36 Atl. 473.

And it is no defence that the dangerous condition was created by the act of a stranger if the master had reasonable cause to know of the danger which was threatened, for a considerable time before the servant received his injury. *Doyle v. Toledo etc. Co.* (Mich.) 54 L. R. A. 461; *Erslew v. New Orleans etc. Co.* 49 La. Ann. 86, 21 S. E. 153; *Chicago etc. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Southern P. Co. v. Lafferty*, 57 Fed. 536, 6 C. C. A. 474; *Texas etc. Co. v. Hohn*, 1 Tex. Civ. App. 36; *Burnes v. Kansas etc. Co.*, 129 Mo. 41; *Knahla v. Oregon etc. Co.*, 21 Ore. 136; *Bartow v. Iowa Telephone Co.*, 17 Am. Neg. Rep. 502; Labatt on Master and Servant, §171; *Brown v. Town of Swanton*, 69 Vt. 53; *Dufur v. B. & M. R. R. Co.*, 75 Vt. 165.

The defendants are properly joined. Though the parties act independently, and their acts of negligence are separate and independent, if those acts concur in causing a single injury to a third person, and it is impossible to determine in what proportion each contributes to the injury, both parties are joint tort feasons and are liable to the person injured, either jointly or severally. *Peckham v. Burlington*, Brayt. 134; 15 Enc. of Pl. & Pr. 558; Deering on Neg., §395; *Matthews v. Delaware etc. Co.*, 56 N. J. L. 34; *Colegrove v. New York etc. Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178; *Slater v. Mercereau*, 64 N. Y. 138; *Wabash etc. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Consolidated Ice Machine Co. v. Keifer*, 134 Ill. 481, 23 Am. St. Rep. 688; *Village of Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248; *Electric Railway Co. v. Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614; *City Electric etc. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262; *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 56 Am. St. Rep. 59; *Matthews v. Seaboard Air Line Ry.*, 67 So. Car. 449, 65 L. R. A. 286.

Again, if the defendants are misjoined, the misjoinder cannot be taken advantage of by demurrer. Since actions *ex delicto* are joint and several, a joint liability need not be proved, and,

consequently, a misjoinder of defendants will not defeat a recovery against any or either proved guilty. 15 Enc. of Pl. & Pr. 583; 1 Chitty, Pleadings, (14th Am. Ed.) 86; 3 Addison, Torts, (Wood's Ed.) § 1321; *Allen v. Craig*, 13 N. J. L. 294; *Keer v. Oliver*, 61 N. J. L. 154; Dicey, Parties to Actions, (Truman's Notes), Rule 118, p. 530.

ROWELL, C. J. This is case for negligence. The declaration contains two counts, and is demurred to by both defendants. The first count alleges that before and at the time in question the defendant, The New England Telephone & Telegraph Company, owned and operated a telephone line from Williamstown to Graniteville; that one of the poles of that line stood at the junction of two highways near Graniteville, near the top of which were two cross pieces to which the wires were fastened; that in order to attach the wires, and to repair them, it was necessary to climb the pole and work at the top of it; that before and at the time in question the other defendant, The Consolidated Lighting Company, was engaged in generating and selling electricity for artificial light, heat, and power; that after the construction of the telephone line, and before the time in question, the Lighting Company constructed an electrical line from Barre to Graniteville consisting of three wires strung on poles, for the purpose of transmitting a powerful current of electricity, dangerous to human life; that the poles of the electrical line were placed on the same side of the highway from said junction to Graniteville as the telephone poles, and for the greater part of the way the electrical wires were strung and maintained above and directly over the poles and wires of the telephone line, and were constructed and maintained directly over the telephone pole at the junction of said highways.

The count further alleges that it was the duty of the Lighting Company so to construct and maintain its line as not to endanger the safety of the Telephone Company's servants while on the poles of its line, but that the Lighting Company, disregarding its duty in this behalf, so carelessly and negligently constructed and maintained its line that the wires thereof were only about twenty-seven inches from the top of the telephone pole standing at the junction of said highways, thereby greatly

endangering the safety of the Telephone Company's servants who had to work at the top of said pole.

The count further alleges that at the time in question the plaintiff was in the service of the Telephone Company as a line-man, and that as such it became and was his duty to climb said pole for the purpose of attaching wires to one of the cross pieces, and that it was the duty of the Telephone Company to furnish him a reasonably safe place in which to do that work, but that the top of said pole was an unsafe place "because of the close proximity of the electrical wires," as said company had reason to know, and that it was the duty of said company to render said pole a safe place, either by removing it, or by compelling the Lighting Company to remove its wires, neither of which it did, but suffered and permitted said pole and the electrical wires thus to remain in dangerous proximity to each other.

The count further alleges that at the time in question said last mentioned wires were charged with a dangerous current of electricity, and that the plaintiff was wholly ignorant of the close proximity of said wires to said pole, and was wholly ignorant that said pole was an unsafe place to work, and that while at work at the top thereof, fastening wires to one of the cross pieces, without fault or negligence on his part, but solely in consequence of the negligence of the Lighting Company in constructing and maintaining its line as aforesaid, and of the negligence of the Telephone Company in suffering said pole and said electrical wires to remain in such close proximity to each other, he came in contact with said wires, and was burned and injured.

The second count is essentially like the first, except that it omits the allegation that the Telephone Company had reason to know that the top of said pole was an unsafe place to work, and charges the duty of the defendants as a joint duty, and its breach as a joint breach.

It is objected that the declaration is bad for misjoinder of defendants and causes of action, and urged that the rule of the common law—formulated when almost all the cases of tort were for intentional wrongs—that tort feasons cannot be joined unless there was concert of action or common design, is most logically applicable to negligence cases also, which have so

greatly increased since the introduction of modern utilities, and that a broader rule involves a very distinct departure from the original common-law conception of joint tort feasons; that when two defendants act independently of each other, but their relations to the plaintiff are similar, so that the duties they have violated are of a similar character, and the defences available to them rest upon the same legal principles, and in general the standard of care and the tests of negligence as against both are substantially the same,—it might occasion no serious practical difficulty to try both cases in one action. But that when, as here, the duties that the two defendants are alleged to have violated are entirely different in character; when they stand in entirely different relations to the plaintiff; when the defences available to them are distinct, and based upon entirely different legal principles,—the danger of confusing the jury with evidence and instructions applicable to one case and not to the other, and the resulting risk of injustice to the plaintiff or to one or both of the defendants,—constitute a sufficient objection, both theoretical and practical, to the joinder of two such causes of action in a single count of a single declaration; that the objection of duplicity in common-law pleadings, and of multifariousness in equity, applies with equal force to such a misjoinder; and the fact that the plaintiff's damage is the same in both cases, tends only to increase the confusion.

It is true that the common-law rule for joining tort feasons, when originally formulated, was based upon the conception of concert of action or common design. And it may be true, as claimed, that this conception resulted from the fact that then almost all of the tort cases were for intentional wrongs. But the rule is not confined to intentional wrongs, but embraces unintentional wrongs as well, for all agree that it embraces cases of wrongful neglect of joint duties. The difference of opinion comes when you have wrongful neglect of separate duties. But even here that difference is not so marked when the duties are similar as it is when they are dissimilar. In the latter case it is more strongly urged that to impose a joint liability would be an unwarrantable departure from the rule. But it cannot be said to be a departure from the rule to apply it to cases involving elements generically the same though specifically different, that is, elements that give you concert of action

or common design within the meaning of the rule. Now the rule does not require actual concert as distinguished from passive concert, nor actual community as distinguished from passive community; if it does, the wrongful neglect of joint duties would not be within it, for there you have only passive concert or passive community.

Although in respect of negligent injuries there is considerable conflict of opinion as to what constitutes joint liability, yet we think that the weight of authority as well as the principle of the rule sustain this proposition, namely: that when two owe to another separate duties, though differentiated by the relations they severally sustain to him, but primary and not secondary as between themselves, and each neglects to perform his duty, with no actual concert of action nor community of design between them, and their neglects concur to produce a single injury that would not have happened without such concurrence, so that each is a proximate and an efficient cause,—the injury may be attributed to either or both of the causes, and each of the wrong-doers is liable for the whole damage, and therefore they may be sued jointly or severally at the election of the party injured.

This proposition is well exemplified by the numerous cases holding that when a passenger on a railroad train is injured by a collision of his train with the train of another road, caused by the concurrent negligence of both roads, the carrier and the non-carrier are jointly liable. Here the duties are different because of the different relation that each road sustains to the passenger; still, as the breach of their duties concurred in producing the injury, which would not have happened without such concurrence, they are held jointly liable. There are numerous electrical cases essentially like the one at bar in their facts, in which the same thing is held. There are, however, cases that hold the other way; but it is unnecessary to refer to the cases on either side, as they are largely cited in the briefs. Judge Cooley favors this proposition. Cooley, Torts, 3d Ed. 246, 247. And the case in hand comes within it, for by wrongfully neglecting to remedy the dangerous condition complained of, which either could have done, the defendants passively concurred in maintaining and taking the risk of it; and as their neglects in this behalf concurred in producing the plaintiff's

injury, which would not have happened without such concurrence, they passively and by community of wrong participated in its infliction, and therefore are jointly liable for it.

We are not much impressed by the suggestion that the danger of confusing the jury and thereby of doing injustice to some of the parties constitutes a sufficient objection to the joinder, for we do not think that such danger exists to any embarrassing extent. It is true that some courts lay stress upon that, but the more part take no notice of it.

The sole negligence alleged against the Lighting Company is, that it placed and maintained its wires in the dangerous proximity of twenty-seven inches above the top of the telephone pole on which the plaintiff was working at the time of his injury. The company contends that this alone does not make a case of actionable negligence against it; that the question arises whether the injury was the natural and probable consequence of the negligence alleged, in the sense that a prudent man ought to have foreseen it; that that question cannot be answered in favor of the plaintiff on that allegation, for that the danger comes only when electricity escapes by reason of defective insulation, so that proof of the proximity alleged, without other evidence explaining how the injury occurred, would not be sufficient to show the company guilty of actionable negligence; that the cases uniformly set forth as the proximate cause of injuries arising from the escape of electricity, a defect or break of the insulation, and that no such defect is here alleged; that you cannot answer, *res ipsa loquiter*, for although it may be an irresistible inference that electricity did escape by reason of improper insulation, yet it does not follow from that alone that the company is liable, for it may not have been to blame for it, and if it was, the plaintiff may have known of the defect as well as the company; and besides, the declaration excludes any claim of negligence on the part of the company in respect of defective or improper insulation or in any other respect except only in placing and maintaining its wires in the proximity alleged.

It is undoubtedly an irresistible inference from what is alleged, as counsel seem to think, that electricity did escape by reason of imperfect insulation, for otherwise the plaintiff could not have been burned and injured as alleged; and so the injury

speaks for itself to this intent, and is *prima facie* evidence that the company was to blame for it, and guilty of the negligence alleged. This being so, the fact of imperfect insulation, and the escape of electricity by reason of it, sufficiently appear, the rule being that you need not allege what is necessarily implied in what you do allege. Thus, if a man plead that he is heir to such an one, he need not allege that that one is dead, for that is implied, as no one is heir to the living.

Thus it appears that the proximate cause of the injury, as counsel call it, namely, the escape of electricity by reason of imperfect insulation, is not wanting, as claimed, and that the declaration does not exclude all claim of negligence in respect of it; for the doctrine of *res ipsa loquiter* is merely a rule of evidence, and when it is evidence of the negligence alleged, the plaintiff is entitled to the benefit of it.

The suggestion that the plaintiff may have known of the imperfect insulation is no answer to the declaration, for it cannot be said that he did know; and if he did, that alone is not enough, for mere knowledge of a risk does not necessarily involve consent to the risk, for that would be saying *scienti non fit injuria*, whereas the maxim is, *volenti non fit injuria*, which applies between strangers as well as between master and servant. Hence, the company having, *prima facie*, violated its duty to the plaintiff, he must have contributed to the accident by his own negligence, or have voluntarily encountered the danger within the meaning of the maxim; and these are questions of fact, as the case is declared upon. *Thrussell v. Handyside*, 20 Q. B. D. 359; *Smith v. Baker*, [1891] A. C. 325; *Thomas v. Quartermaine*, 18 Q. B. D. 685, 698.

The Telephone Company claims that the declaration is bad (1) because it fails to show negligence on its part; (2) because it shows that the plaintiff assumed the risk; and (3) that he was guilty of contributory negligence.

The reasons relied upon to sustain the claim of failure to show negligence on its part are summarized as follows: (1) that the duty to provide a reasonably safe place is not absolute, but relative, requiring only reasonable care to provide a reasonably safe place in view of the nature of the business and the circumstances of the case; (2) that the nature of the telephone business, and the manner in which as a practical matter

it must be conducted, render it impossible always to avoid the proximity of electric light wires; (3) that the alleged dangerous situation of which the plaintiff complains was not brought about by the company, and does not appear to have been so serious as reasonably to impose upon it the duty of relocating its line; (4) that no lack of warning is relied upon, and it does not appear that warning was not in fact given; (5) that the danger was so obvious that warning was unnecessary; and (6) that it does not appear that the plaintiff's work required him to go within reach of the electric light wires.

But the first two reasons do not show the declaration bad in law. They are only a statement of the character and extent of the company's duty under the law, and of what should be considered in determining whether in fact it performed that duty.

As to the third reason, although the alleged dangerous situation was not brought about by the company in the sense that it actively participated in creating it; yet, if dangerous, it was as much its duty to remedy it as though it had brought it about in the first place; and that it was dangerous, is shown by the declaration.

As to lack of warning not being relied upon, and its not appearing that warning was not given, it must be borne in mind that the danger complained of is the proximity of the electric wires to the top of the pole; and of that danger, the declaration alleges, the plaintiff was wholly ignorant. This, in effect, is a negation of warning, and a reliance upon lack of warning.

As to whether the danger was so obvious that warning was not necessary, is involved in assumption of risk, and will be considered in that connection.

As to its not appearing that plaintiff's work required him to go within reach of the electric light wires, it is sufficient to say that the declaration alleges that it was necessary to work at the top of the pole, and this the demurrer admits, and it appears that the top of the pole was within reach of the electric wires.

As to the assumption of risk. This was not an ordinary risk, and therefore assumed by the plaintiff, but an extraordinary risk, and therefore not assumed by the plaintiff unless he knew and comprehended it, or it was so plainly observable that he will be taken to have known and comprehended it. The declara-

tion alleges that he did not in fact know it, and the question is whether, in the circumstances alleged, the law will impute knowledge to him. We think it will not. It was the duty of the company to see to it that the electric wires were a safe distance from the pole, and the plaintiff had a right to assume that it had performed that duty, and therefore was not bound to exercise care to find out whether it had or not. *Dunbar v. The Central Vt. Railway Co.*, 79 Vt. 474, 65 Atl. 528.

The case is not like *Sias v. The Consolidated Lighting Co.*, 73 Vt. 35, 50 Atl. 554, for there the duty of inspection rested upon the plaintiff. Nor is it like *McKane v. Marr & Gordon*, 77 Vt. 7, 58 Atl. 721, for that was a case of equal knowledge. But here the plaintiff did not know, and was not bound to find out; whereas the company is charged with knowing, because it could have found out by the exercise of proper care. Nor is it like *Chisholm* against this same company, 176 Mass. 125, on which so much reliance is placed, for there the dangerous condition was not due to the defendant's fault, while here it was. Nor yet is it like *Anderson v. Inland Telephone & Telegraph Co.*, 19 Wash. 575, 7 Am. Elect. Cas. 725, to which reference is made, for there the risk was regarded as ordinary, and therefore assumed by the plaintiff; while here it is regarded as extraordinary, and therefore not assumed by the plaintiff. Nor like *Carr v. Manchester Electric Co.* and *Union Electric Co.*, 70 N. H. 308, 7 Am. Elect. Cas. 746, for there the plaintiff knew the risk, and therefore was held to have assumed it.

The case is more like *Morrisette v. Canadian Pacific R. R. Co.*, 74 Vt. 232, 52 Atl. 520. There the plaintiff was swept from the side of a moving freight car by a switch standing near the track. It was contended that the danger was so obvious that he assumed the risk. It appeared that he had worked for the defendant several years as brakeman on different parts of the line, and for several months next before the accident, on the part where it happened, and was acquainted with the sidings there, and knew the location of the switch, and had operated it several times. He had never passed it before on the side of a car, and had never been told and did not know that it was near enough to the track to sweep one from the side of a car. He had never staid by the switch when a car passed it, and had always found the other switches on the road safe. The court

said that although the switch was dangerous only because of its proximity to the track, yet it was impossible to say as matter of law that the danger could be seen and comprehended by mere observation, unaided by measurement, seeing a car pass, or some such thing; that if it could have been, it was fair to assume that some one whose business it was would have discovered and remedied it, for the switch had stood there several years.

So here, much the same thing can be said, for it does not appear that the plaintiff ever worked upon the pole before, or ever saw any one work upon it, or ever was upon it for any purpose; and he never was told, and did not know, that it was in dangerous proximity to the electric wires. We hold, therefore, here as there, that in the circumstances alleged, the danger was not so plainly observable that the law will say that he knew and comprehended it. Obviously, fair-minded men might differ about it. Hence, it must go to the jury.

It is equally clear that it cannot be said as matter of law that the plaintiff was guilty of contributory negligence. That, also, must go to the jury. It is not necessary for present purposes to inquire whether there is any difference between assumption of risk and contributory negligence.

Judgment affirmed and cause remanded.

NORTH TROY GRADED SCHOOL DISTRICT v. TOWN OF TROY ET AL.

Special Term at St. Johnsbury, February, 1907.

Present: ROWELL, C. J., TYLER, and MUNSON, JJ., and HALL, SUPERIOR J.

Opinion filed May 10, 1907.

Wills — Trusts — Construction — Execution — Supervision by Courts — School Districts — Funds — Bequests — Statutes — Construction — Estoppel — Change in Position — Municipal Corporations — Creation by Implication — Interest — Time of Beginning.

A will left certain property to the town of Troy in trust "for all the school districts and fractional school districts in said town and all that may hereafter be in said town," the interest to be divided by the selectmen each year "forever," so that each fractional part of a school district should receive one-half as much as a whole district, and each whole district to draw the same amount. When the will was made, and for some time after the testator's death, there were nine whole and four fractional school districts in Troy, but subsequently the whole town became a single school district, under the legislation creating the town school district system, and still later the orator school district was incorporated by special Act of the Legislature, comprising less than one-half of two of the old school districts. *Held* that the orator school district is entitled to one-half of the income of the fund, since there are but two school districts in the town.

The provision of the orator's charter, that it should have the same share of income from bequests to the town of Troy that it would by law receive as "an unincorporated district," means that it should receive the same share of such bequests that it would if it were a school district not incorporated by special Act of the Legislature.

Where a will left funds to a town in trust, the income thereof to be divided annually by its selectmen among its school districts in a specified manner, the selectmen, in making such division, act solely under the authority derived from the will, and an erroneous division made by them neither binds the parties, nor precludes the courts from revising and correcting it.

Since defendant school district has made no change in its situation on account of the orator's conduct in not claiming its proper share of the income in question, the orator is not bound by its conduct in that respect.

Where, in a suit in equity against a town, its selectmen were cited in as defendants, in their official capacity, but the bill made no case against them till an amendment was filed after their respective terms had expired, the bill will be dismissed as to them, with costs of appeal.

Where a will left funds to a town in trust, the income thereof to be divided annually by its selectmen among its school districts in a specified manner, a decree against one of the selectmen as to the manner of dividing the income will be as effective as against all

of the board, since their authority is private and all must concur in its execution.

Where a town is trustee under a will of certain funds, the interest thereon to be divided annually by its selectmen among its school districts, it is a proper and necessary party to a suit in equity to construe the will and to restrain an alleged improper execution of the trust.

Where powers and privileges are conferred by statute upon a body of men or the inhabitants of a district, and the duties imposed cannot be exercised and enjoyed without corporate capacity, such capacity is created by implication, if that appears to be the intent of the Legislature.

A town school district, existing under our statute creating the town school district system, is a body corporate by necessary implication, separate and distinct from the town, since it has, in effect, creation by name, perpetuity of existence, unity of person, and governing boards elected at town school district meetings.

In a suit in equity against a town, as trustee under a will of a certain fund, and a town school district, as one of the beneficiaries of the fund, for a portion of the fund improperly paid to the town school district, in which there was a recovery, the town school district should pay interest from the time it was made a party and the original bill was served upon it, though the original bill was against the town alone, for the town school district knew from the bill that the suit was brought for the recovery of money it had received.

Although the bill alleges nothing against the town school district in regard to the money, but only against the town, nor does it pray for relief against the town school district, except by the general prayer, but only against the town, this will not defeat the bill where the case has gone to the extent of settling the facts, and they show that the orator is entitled to relief, but the orator will be allowed to amend its bill, so that it can obtain the relief to which it is entitled.

APPEAL IN CHANCERY, Orleans County. Heard at Chambers, July 19, 1906, on the pleadings and an agreed statement of facts, *Watson*, Chancellor. Decree, that the orator is entitled annually to receive one-half the income of the Moses Dodge Fund, and that the defendant town school district pay to the orator all the income of said fund that said defendant has annually

received, from the year 1896 to the commencement of this suit, in excess of one-half such annual income, with interest on each annual overpayment from the time it was received. The defendant appealed. The opinion fully states the case.

O. S. Annis and J. W. Redmond for the orators.

By the common law, if a part of the territory of a school district is separated from it, and annexed to, or organized into, another, the original organization retains all its property, property rights, and franchises, unless some statutory provision is made to the contrary. *Winona v. Sch. Dist.*, 40 Minn. 13, 12 Am. St. Rep. 687; *Briggs v. Sch. Dist.*, 21 Wis. 348; *Joint Sch. Dist. v. Sch. Dist.*, 92 Wis. 608; *Grenville v. Mason*, 53 N. H. 515; *Westfield v. Coventry*, 71 Vt. 175; *Rutland v. Proctor*, 68 Vt. 153. This explains the reason for that provision in the orator's charter relative to its share of the public money, and of the income from bequests and legacies to the town of Troy for the benefit of its public schools.

Young & Young for the defendant.

The selectmen in making the annual division of the income from the Dodge Fund acted in their private capacity, as appointees of the testator, and not in their official capacity. *School Dist. v. Bridport*, 63 Vt. 383; *Welsh v. Village of Rutland*, 56 Vt. 228; *Fisher v. Boston*, 104 Mass. 87; *Davenport v. Johnson*, 49 Vt. 403.

It was error to give the orator interest from the date of the various overpayments. *Dalrymple v. Whitingham*, 26 Vt. 345; *Newell v. Keith's Exr.*, 11 Vt. 214; *Everts v. Nason's Est.*, 11 Vt. 122; *Langdon v. Castleton*, 30 Vt. 285.

In granting the orator's charter, the Legislature could impose any terms and conditions it chose, and such terms and conditions as it did impose are binding on the orator. *Commissioners of Laramie Co. v. Commissioners of Alabama Co. etc.*, 92 U. S. 307; *Windham v. Portland*, 4 Mass. 389; *Newchester v. Bristol*, 3 N. H. 71; *Kies v. Lawrey*, 199 U. S. 233; *Barre v. School Dist.*, 67 Vt. 108; *Sheldon v. Stockbridge*, 67 Vt. 299.

There is no allegation in either the original or the amended bill that the defendant Town School District has ever received any of the income of the Dodge Fund. Hence, it was error to decree that said defendant should refund any part of such income. *Thomas v. Warner*, 15 Vt. 110; *Barrett v. Sargent*, 18 Vt. 365.

ROWELL, C. J. On March 7, 1890, Moses Dodge, who then was, and for forty years had been, a resident of the town of Troy, made his will, whereby he gave the residue of his estate to said town in these words:

"The residue and remainder of all my estate, both real and personal, I give to the town of Troy in trust, and all of the same to be held in trust by said town for all the school districts and fractional school districts in said town, and all that may hereafter be in said town; the same to be known and forever called The Moses Dodge Fund, and all of the same to be kept at interest by said town forever, and the interest on all of the same to be divided each year by the selectmen of said town on the Friday next before the last Tuesday of March of each year hereafter forever after my death between the school districts and the fractional parts of school districts in said town as afore-said, each fractional part of a school district, one-half as much as a whole district, and each whole school district to draw the same amount each year."

The testator died at Troy on October 3, 1890, and his will was duly probated, and the residue of his estate, amounting to \$13,272.62, was paid to the town under the will, and the town still holds it.

Before and at the time in question, and up to the time the town system was adopted by the Act of 1892, the several district system prevailed in Troy, under which at the time in question the town was divided into nine whole districts and four fractional districts; and so when the town became a single district under said act, as it did, there being no other district in town, it was entitled to the whole income of said fund. But in 1894, the Legislature, at the special instance and request of the inhabitants of the incorporated village of North Troy, incorporated that part of the town comprising the territory of said village as a graded

school district, with all the powers, duties, and privileges granted by law to such districts, and giving it the same share of the public money, and the same share of income from bequests and legacies to the town for the benefit of the public schools of the town, that by law it would receive as an unincorporated district. This district is the orator, and consists of considerable less than half of the territory of old school districts Nos. 1 and 10 as they existed before and at the time the Act of 1892 took effect, and does not include all of either of said districts. The orator's grand list is about a third as much as that of the rest of the town. Up to and including 1905, the income of said fund has been divided between the orator and the town district on the basis of two-elevenths to the orator and nine-elevenths to the town district. But now the orator claims one-half of said income because there are but two school districts in town, and seeks a decree to that effect, and also to recover what it has been deprived of by the divisions that have been made.

The testator never lived in what is now the orator district, but most of the time, in one of the smaller districts of the town. He was fully conversant with the division of the town into school districts, and knew in what subjects the law required instruction to be given in the schools maintained therein.

The defendants claim that a school district like the orator, incorporated by special Act of the Legislature, was not in the contemplation of the testator when he made his will, nor what he meant by the words, "school districts," as therein used; but that he contemplated, and that the will should be construed to mean, only school districts created under the general law of the State, such as he had always known and been accustomed to.

But when we read the will in the light of the circumstances in which it was written, and consider, as we may, that the testator knew that the town could make and unmake, unite and divide, its school districts at pleasure, and thereby increase or diminish their number; and not only that, but could abolish them altogether, and adopt the town system, as the law had been for twenty years; and that the Legislature could create, and for a long time had created, graded school districts by special act, and could, in fine, control the whole system of public schools; and especially when we consider that his gift was to go on forever, and that he could not foretell what changes might take place,—

it can hardly be supposed that he undertook to divine whether the school district system would go on in the town as long as his gift, and made his will upon the theory that it would; but rather that he knew he could not foretell how that would be, and adopted a basis for dividing the income that would be likely to fit any change that might be made in that regard, and so took no note of population, average attendance, school age, territorial extent, nor any other thing save only the number of districts, which he knew was liable to change at any time, as the language of his will shows. He did not seem to care how many school districts there were, and why should he care whether they were formed under general or special law? For his purpose, a school district was a school district, however formed. Suppose the town itself, as the testator knew it might as the law then was, had made the orator's territory into a district, and all the rest of the town into another, would it be said that the testator did not contemplate that, and that the income could not be divided between them on the basis of the will? Hardly that, we think. Then why say that, merely because the orator was created by special act? It is clear that you cannot. It is unnecessary to say that the language of the will must control, and that language is, that each whole school district shall draw the same amount each year forever.

But the defendants say this is inequitable. If that is so, nevertheless, the language of the will must control, and no war-rantable construction can make it otherwise.

The defendants also say that though the orator is entitled to one-half under the will, its charter limits it to a less amount, if indeed it is entitled to anything thereunder, because of the provision that it shall receive the same share of the income that by law it would receive as an unincorporated district, under which, they say, strictly speaking, it could receive nothing, because, as the law then stood, it had, and could have, no existence as an unincorporated district. But that aside, they suggest a division in proportion to the number of scholars of the same grade in the two districts; but claim that a proper construction of the charter would limit the orator to the same proportion that it received as an unincorporated district before the adoption of the town system, which should in no event exceed two-elevenths, and in the future, that that amount should be

reduced in the proportion that the scholars resident in that part of Nos. 1 and 10 not included in the orator, bears to the scholars resident therein.

The orator contends that its charter means that it is to receive the same share of the income that it would receive were it a school district not incorporated by special act—a school district without a special charter—an unincorporated school district. And this seems to us to be the fair import of the act. The other view, although worthy of consideration, does not strike us as tenable. The obvious purpose of the Legislature was, not to say definitely what share of the income from bequests and legacies the orator should receive, but, as a basis for determining that, to give it the same share in all cases that it would receive were it an unincorporated district, and leave that to be determined under the general law applicable to the particular case. The inquiry is, then, what share of the income in question would the orator receive were it, what its charter assumes it to be for this purpose, an unincorporated district; and the answer is, as we construe the will, one-half, for then there would be, as there are now, only two school districts in town, and the orator would be one of them.

But the defendants object that as there is in the will no suggestion of appeal from the action of the selectmen in dividing the income, their division, made in good faith, is final and conclusive between the parties, especially as the money has been accepted and received thereunder and appropriated; that if the orator intended to question the correctness of their decision, it should have declined to receive the money, and brought suit for a construction of the will and directions to the selectmen; but not having done that, but having accepted and used the money distributed to it by the selectmen, it is bound by their decision and its own conduct, and precluded from relief in respect of past divisions.

The defendants do not claim that the selectmen were acting in their official capacity in making the division, but expressly say they were not, and were in no sense the agents of the town, and had no power to bind it, but were acting solely as the appointees of the testator; and this, we think, is the correct view of the matter. This being so, the proposition contended for cannot be maintained, for the will cannot be construed to give

finality to an erroneous division by the selectmen. They derive their authority solely from the will, and that directs just how the division shall be made, and it must be made accordingly; and if it is not, it is without authority and void, and neither binds the parties nor precludes the courts, but is subject to revision and correction.

Whether the orator is bound or not by its conduct, is principally a question of the inequity of permitting its claim for the money to be enforced—an inequity based upon some change in the situation of the defendants made in reliance upon that conduct. But as it does not appear that any such change was made, it cannot be said that the orator is bound by its conduct in the respect claimed.

The defendants Hunt and Wheeler claim that they should have been hence dismissed with costs. The decree takes no note of them in any way. The claim is based upon the idea that they were not made parties until the amended bill was filed, when they had ceased to be selectmen by the expiration of their term of office, and hence were not even proper parties. But the fact appears to be that they were cited in nearly a year before that, when they were in office, under an order for that purpose following a decision on demurrer that they were necessary parties. After being thus cited they appeared, and moved to dismiss because the bill as it then stood made no case against them; and thereupon, on hearing, it was ordered that the motion be sustained, and the bill dismissed with costs, unless the orator amended its bill in the respects complained of in such a time, and thereupon the amended bill was filed, though not within the time limited, but no objection appears to have been made on that account.

It is a general rule that no one should be made a party defendant to a bill who has no interest in the subject-matter of the suit and against whom no decree can be made. But here these defendants could have been decreed against while in office by way of directing them how to divide the income, and enjoining them from dividing it otherwise, and so they were proper parties, at least, when cited in. But now, having gone out of office, which they did before the amended bill was filed, no decree can be made against them, for they could not obey it if there should be, and the court will not do a nugatory thing,

as is often said in mandamus proceeding, in which the court never commands the doing of a thing by one who would have no power to do it if commanded. Therefore we think that the bill should be dismissed as to these defendants, with costs in this Court, but whether with costs below or not we leave to be there determined.

The defendant-Peck is still a selectman, and has been since before the bill was brought; and although he is the only member of the board who is a party to the suit, yet a decree against him will be as effective as one against all the members of the board, for their authority is private and not public, and therefore all must concur in its execution.

The town claims that it is neither a necessary nor a proper party, for that it has received none of the income in question, and therefore is not liable for it; that the selectmen, in dividing it, were not its agents, but the agents of the testator, and that it is not liable for what they did, however erroneous, nor for the results of it; that the only duty the will imposes upon it is, to take the bequest, invest it, and pay the income to those designated by the men acting as its board of selectmen, all which it has done. But this claim fails to note that the town's trusteeship gives it the legal title to the fund, and therefore makes it a proper party at least; and the general rule is that when the suit is by or against the beneficiaries, the trustee is a necessary party. Story's Eq. Pl. §207. And besides, as the town is the conferee of a trust and not the donee of a mere power, it can be directed and restrained in respect of its duty sufficiently to insure a proper execution of its trust; and for this reason also it is a proper party. *Bacon v. Bacon*, 55 Vt. 243, 249.

But this does not determine whether the town is liable or not, for that depends upon whether or not the town and the town district are separate and distinct legal entities; for if they are, the town district being the one that has received the money, is the one liable for it.

Now it is settled law that though in this country corporations, public and private, are created by statute, as they are in England, though they may be created otherwise also, yet, that no particular form of words nor technical mode of expression is necessary to their creation; but if powers and privileges are conferred upon a body of men or the inhabitants of a district

and duties imposed that cannot be exercised, enjoyed, and performed without corporate capacity, such capacity is created by implication, if such appears to be the intention of the Legislature or other authority granting the powers. Thus, in the case of *Sutton Hospital*, 10 Co. 23, 28, to the objection that in the license there were not words of *fundare, erigere, facere*, it was resolved that notwithstanding that, the grant was good, for that to the essence of a body politic two things only are requisite, namely, a corporation and a gift, and not any words of *fundare, erigere*, and *stabilire*, nor words to such effect; for no such words were contained in the said grant of H. 4, and yet it was adjudged a good chauntry, lawfully incorporated and founded; and if such words had been necessary and requisite in law, the judgment ought to have been against the chauntry, because they were omitted in the King's grant.

In the *Conservators of the River Tone v. Ash*, 10 B. & C. 349, the plaintiff claimed to be a corporation by act of Parliament for making and keeping the Tone navigable, whereby it was enacted that the persons therein named and their successors should be conservators of the river, and should have power to cleanse, scour, open, and keep the river navigable, and to cut and make a new channel, if need be, through the ground of other persons, making compensation to the owners. They were also empowered to do divers other things touching the performance of their duties under the act, among which was the making of contracts binding the whole body, and to sue and be sued by the name of The Conservators of the River Tone in the county of Somerset. It was held that as it manifestly appeared from the act that the conservators should take land by succession and not by inheritance, although they were not created a corporation by express words, they were by implication, and therefore entitled to sue in their corporate name for injury to their real property.

It has been held in this State that when a public grant emanates from the same power that can create a corporation, the grant itself creates and gives the capacity to take, and, as a corporation if necessary to that end. *Lord v. Bigelow*, 8 Vt. 445.

In the *Inhabitants of the Fourth School District of Rumford v. Wood*, 13 Mass. 193, the question was whether the plain-

tiff had sufficient corporate capacity to maintain the action, which was for the breach of a contract to build a school house on the defendant's land, and to lease the land to the district. The statute did not expressly incorporate the district, but empowered it to raise money by majority vote to erect, repair, or purchase a school house, and to determine its site; and it was held that by necessary implication the district had the authority requisite to execute the purpose of its creation, and therefore could maintain the action.

In *Brokin v. Van Valen*, 56 N. J. Law, 85, the question was whether two villages were incorporated. The statute relating to them created a board of trustees as a governing body, and conferred corporate powers upon them. The powers were limited, but they were corporate powers usually conferred upon municipalities of that grade. The Court said it was not necessary that all kinds of municipal powers should be conferred, nor that the powers bestowed should be conferred by express legislative grant, in order to create a body politic and corporate; that such express words are wanting in many instances; but if, from the whole statute, incorporation is inferred, it is enough, and that in that case it seemed conclusive, under the ordinary interpretation of the language of statutes, that corporate powers were conferred; that the power to issue bonds in the name of the village was a corporate power, and if they were not possessed of that power, the words of the statute giving the power were meaningless.

In *Levy Court v. Coroner*, 2 Wall. 501, the question was whether the Levy Court of Washington County, in the District of Columbia, had a legal capacity to sue in a court of justice. It was the body charged with the administration of the ministerial and financial duties of the county. It was charged with the duty of laying out and repairing roads, building bridges and keeping them in good order, providing poorhouses and the general care of the poor, laying and collecting taxes necessary to enable it to discharge its duties, and to pay the expenses of the county. *Held*, if not a corporation, in the full sense, yet it was a *quasi* corporation, and could sue and be sued in regard to any matter in which it had rights to enforce or obligations to fulfil; that this principle, a necessary one in the enlarged sphere of

usefulness that such bodies are made to perform in modern times, is well supported by adjudged cases.

In *Thomas v. Dakin*, 22 Wend. 9, the question was whether certain associations formed under an act to authorize the business of banking were corporations, and it was held that they were. Judge Cowen said that it was impossible for him to see the force of the argument that because the Legislature had constantly avoided calling the associations a corporation, they could not be adjudged so; that if they had the attributes of corporations, and were so in the nature of things, the court could not refuse to regard them so any more than it could to regard natural persons as such because the Legislature in making some provision for them, had been pleased to designate them as belonging to some other species. In *Commonwealth v. West Chester R. R. Co.*, 3 Grant's Cases, Pa. 200, it is said that a grant to perform corporate acts implies a grant of corporate powers. And in *Delaware Division Canal Co. v. Commonwealth*, 50 Pa. St. 399, it is said that it mattered not that the terms of incorporation were less formal than usual, since it was apparent from the act that a corporation was intended, and manifest that such an organization was absolutely necessary to the management and enjoyment of the property.

In *Mahony v. The Bank of the State*, 4 Ark. 620, the question was whether the bank was incorporated. It was contended that the act in question was a mere abstraction and non-entity, as it declared only that a bank should be established, designated by name. The Court said that it was true that there were no express words incorporating any particular persons, still, the fund was placed under the management and control of a directory, who were required to be elected by the Legislature, and the usual powers of banking were conferred upon them; that though the act was vague, it was capable of being understood, and that, taking it altogether, no doubt could be entertained that it was the intention of the Legislature to incorporate the directory, and that the powers and authority conferred upon them could not exist unless they were incorporated.

In the *Commissioners of the Town of Bath v. Boyd*, 1 Ireland's Law, N. C. 194, it was held that a legislative grant of land to the inhabitants of a town for a common, *ipso facto* created them a body politic for the purposes of the grant, though

it did not appear that they had before been created a corporation.

But where a corporation is not necessary for the purposes of the act, one will not be implied. *Walsh v. Trustees of the New York and Brooklyn Bridge*, 96 N. Y. 427.

Thus it appears that the test is, in the absence of express words, whether the powers and privileges conferred and the duties imposed are essentially corporate in their nature. If they are, corporate capacity will be implied, as necessary to carry out the purposes of the act; but otherwise, there will be no such implication. Among the most important characteristics of a corporation are continuance of existence and unity of person, by which a perpetual succession of individuals is capable of acting for the promotion and accomplishment of the particular object in view.

We will paraphrase, as far as necessary, some of the provisions of our various statutes upon the subject of town school districts, to see whether they disclose a necessary implication of corporate capacity, as the statute contains no express words to that effect.

Each town in the State shall constitute one district for school purposes, and the division of towns into school districts is abolished. School districts incorporated by special acts, and school districts in unorganized towns and gores, are not affected by the above provision. Voters in districts incorporated by special acts, cannot vote in town meetings for the officers of, nor upon any matter pertaining to, the schools of the town district. A town school district in a town in which there is an incorporated school district, may hold its annual school meeting at any time other than the annual town meeting, provided it so votes at a previous town meeting, notice of the proposed change being inserted in the warning of the annual town meeting at the request in writing of ten legal voters of the town school district. Each town shall take charge of the school houses within its limits, and the property belonging thereto, and shall pay all outstanding debts for the purchase of land, and the erection of school houses and repairs thereon, and shall provide and maintain suitable school houses, the location and construction of which shall be under the control of the board of school directors, which each town must have, consisting of three citizens of the town,

one of whom shall be elected at each annual meeting of the town for such a term. That board has the care of the school property of the town, and the management of its schools; keeps the school houses repaired and insured; determines the number and location of schools; employs and discharges teachers, and fixes their compensation by majority vote; examines and allows claims arising therefrom, and draws orders upon the town treasurer for the payment thereof; designates the schools that shall be attended by the various pupils in the town; and makes regulations not inconsistent with law for carrying its powers into effect. The board is required to appoint a clerk, who must keep a permanent record of their proceeding, and under V. S. 728 he was to call all special town meetings for the consideration of school matters, and in case of his absence, inability, or neglect to act, some member of the board was to call them; but now, under No. 60, Acts of 1898, the selectmen are to call all such meetings in the same way that other special town meetings are called. Each town is required to maintain schools therein at the expense of the town. The grand list of town districts is made up of the ratable polls and real and personal estate therein. The selectmen must annually appropriate for school purposes a sum not exceeding one-half nor less than one-fifth of the grand list of the town district, and assess a tax to meet the appropriation; and a town district may by special vote raise a larger sum for school purposes. The town treasurer is required to keep a separate account of the moneys appropriated or given for the use of schools, and to pay thereout orders drawn by the board of school directors for school purposes. The selectmen of a town having within its limits a school district incorporated by special act, are required to divide the public school money in the treasury of the town between the town district and the incorporated district on a specified basis.

There is a body of special provisions relating exclusively to school districts in unorganized towns and gores and school districts incorporated by special acts, and to their school houses, and the maintenance of schools by them, and to their taxes and school money.

It is important to note in this connection the indiscriminate use the statute makes of the word *town*, which it often uses as synonymous with *town school district*, thereby creating doubt

and uncertainty whether the town school district is a legal entity, separate and distinct from the town itself. But notwithstanding this, the meaning of the statute is not past finding out, for there is, when taken as a whole, a reasonably clear intent running through it all. Thus, when it says that each town in the State shall constitute one district for school purposes, it does not mean that, for there are many towns in which there are school districts incorporated by special acts, and they are no part of the town for school purposes. It must mean, therefore, and does mean, that that part of each town composed of abolished school districts shall constitute one district for school purposes. So when it says that each town shall take charge of the school houses within its limits, and provide and maintain school houses, it means that the town school district shall do that, for the school houses in incorporated school districts, although within the limits of the town, are not within its jurisdiction to take charge of and maintain. So when it says that every town shall maintain schools therein at the expense of the town, it means that the town school district shall do that, for the town cannot maintain schools at the expense of the whole town when there is an incorporated school district within its limits. There are other similar instances of the incorrect use of the word *town*, but it is unnecessary for present purposes to specify them.

On the other hand there are many instances in which the statute uses the words, *town district*, or, *town school district*, and when it does, they obviously mean an entity separate and distinct from the town itself, as they do when it says that a town school district in a town in which there is an incorporated school district may hold its annual school meeting at any time other than the annual town meeting. So when it says that the grand list of town school districts shall be made up of the ratable polls and the real and personal estate therein. So when it says that a town district may by special vote raise a larger sum for school purposes than that appropriated by the selectmen. So when it says that an incorporated school district may surrender its charter and become a part of the town school district, and that a town school district may merge in an incorporated district.

Our statute is so much like the New Hampshire statute of 1885, adopting the town system of schools, as to induce the belief that ours was modeled upon it. It had the same verbal inac-

curacies of which we have been speaking, and in *Sargent v. School District*, 63 N. H. 528, the Supreme Court of that State had occasion to construe it in respect of those inaccuracies, and gave it the same construction that we here give our statute.

Thus it appears that we have for our town school districts, (1) creation, and by name, in effect, as, in this case, The Town School District of Troy; (2) perpetuity of existence, for their duties are continuous, and will ever be, unless they are relieved therefrom by the same power that imposed them; (3) unity of person, else they could not maintain schools at the public expense, nor vote taxes for school purposes, nor do many other things that they are required to do; and (4) governing boards, elected, the statute says, at town meetings, but it means, at town school district meetings, and it is common knowledge that they are there elected.

Now these functions are essentially corporate in their nature, and cannot be performed without corporate capacity, and hence the necessary implication is that the Legislature intended to confer that capacity, that the districts might fulfil the purpose of their creation. This is the same principle by which when you make a grant, you are taken to grant every thing you can grant, necessary to the beneficial use of the thing granted.

Indeed, it may be said in a general way that the machinery that runs the town is not adapted to running the town district, especially when they are not coterminous, and it cannot be made so under the law.

We hold, therefore, that a town school district under the statute is a corporate body by necessary implication, separate and distinct from the town, whether coterminous with it or not, and all the more so if it is not. This is the construction that New Hampshire has put upon its statute. *Sargent v. School District*, 63 N. H. 528; *Wheeler v. Alton*, 68 N. H. 477.

It is claimed that it was error to allow the orator full costs, for that the order of February 26, 1904, by which the orator had leave to amend its bill on terms that it should "pay into court for the defendants their costs to the date of amendment," which was April 18, 1904, restricted the orator to costs from that time. But the order does not say that the orator shall take no costs to that time. It is silent as to its costs, and does not restrict them even by implication.

It is claimed that it was error to charge the town district with interest before the amended bill was filed. But we think it should pay interest from the time it was made a party and the original bill was served upon it, for although that bill was against the town alone, yet the district knew from it that the money the orator was thereby seeking to recover was the very money it had received and appropriated to its own use, and then it knew that it was retaining the money against the will of the orator, and from that time on it was its duty to pay.

It is claimed that the bill does not support the decree, and that is so, largely, for the decree makes the town district pay the money, whereas the bill alleges nothing against it in regard to the money, but only against the town. Nor does it pray for relief against the district, except by the general prayer, but only against the town.

But this will not defeat the bill, for the case having gone to the extent of settling the facts, and they showing that the orator is entitled to relief, it will not be turned out of court, but be allowed to amend its bill so it can obtain the relief to which it is entitled.

Decree reversed and cause remanded, with mandate that on proper amendment of the bill, a decree be entered for the orator like the one appealed from, except as to costs, and except as far as necessary to alter the same in order to make it conform to and effectuate the views here expressed.

Let the question of costs below be there determined.

MARY M. STRONG v. BURLINGTON TRACTION CO.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed May 10, 1907.

*Carriers—Street Railways—Collision—Injury to Passenger—
Liability of Company.*

Though a street car's collision with a delivery wagon resulted from the deliveryman's negligence in suddenly turning at right angles and crossing the track in front of the car, still the company would be liable to a passenger for her injury due to the collision, if the motorman's negligence in running the car at a very rapid and unusual rate of speed, or too close to a car in front, which passed the deliveryman just before he drove his wagon across the track, prevented the motorman from avoiding the collision after he saw the situation.

The evidence being conflicting as to whether the gong was rung to warn the deliveryman of the approach of the car, it was error to instruct the jury that if the ringing of the gong would have deterred the deliveryman from crossing the track, and it was not rung, the obstruction was the negligent act of defendant; as the inference of negligence is not necessarily contained in that finding.

The motorman had no right to assume, as to plaintiff who was a passenger, that one driving a wagon along the street in the same direction the car was moving would not attempt to cross the track "mid block," but he owed her the duty to exercise the most watchful care and the most active diligence for her safety against collision with the wagon. Whether he performed that duty was, in the circumstances, a question for the jury.

CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1906, Chittenden County, *Miles, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion states the case.

A. G. Whittemore, V. A. Bullard and R. E. Brown for the defendant.

In the circumstances disclosed by plaintiff's case the motor-man was not bound to anticipate such wrongful act of a third party, and from the moment that wrongful act began he did all in his power to prevent a collision. *Davidson v. Denver Tram Co.*, 35 Pac. Rep. 920; *Christensen v. U. Trunk Line*, 6 Wash. 75; *Chicago City Ry. Co. v. Kinnare*, 90 Ill. 210; *Knol v. Third Ave. R. Co.*, 168 N. Y. 592; *Shear. & Red. Neg.*, §500; *R. R. Co. v. Meara*, 52 Ill. 96; *Fritz v. Ry. Co.*, 105 Mich. 50; *Black v. Railway Co.*, 68 L. R. A. 799; *Hamilton v. St. Ry.*, 163 Mass. 199; *Hollinshead v. Railway Co.*, 3 Street Ry. Rep. 604.

Darling & Mower and *C. S. Palmer* for the plaintiff.

In the absence of contributory negligence on the part of plaintiff, defendant is liable, if it was negligent in the operation of its car, regardless of any negligence on the part of the deliveryman. *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341, 75 Am. Dec. 344; *Spooner v. B. C. R. Co.*, 54 N. Y. 230, 13 Am. Rep. 570; *Commonwealth v. Coburn*, 132 Mass. 555; *Wilder v. Stanley*, 65 Vt. 145.

ROWELL, C. J. The plaintiff, a passenger on defendant's open street car, being frightened by a collision between the car and a delivery wagon crossing the track, jumped or was thrown from the car and injured, for which she seeks damages. The wagon was covered, and the seat hooded, with side lights. The driver could look back through the glass doors in the rear end of the wagon.

There was a car just ahead of the plaintiff's car, between which and the curb the deliveryman was driving at a trot in the same direction the car was going, and just as the car passed him, he suddenly turned his horse at right angles and trotted onto the track for the purpose of crossing to the other side of the street, and when the horse got onto the track it slowed up and walked, and the collision happened then, and about "mid block."

The defendant claims that its motion for a verdict should have been sustained, for that the evidence showed that the direct and immediate cause of the accident was the negligent act of

the deliveryman in driving across the track; that the motorman was not bound to anticipate the act of the deliveryman, and did all he could to prevent the collision after he saw that the deliveryman was going to cross.

But the testimony on the part of the plaintiff tended to show that the car on which she was riding was going at a very rapid and an unusual rate of speed, and was running too close to the car ahead of it. Now in one or both of these respects the motorman may have been negligent, and that negligence may have been the reason why he could not prevent the collision after he saw the situation, and therefore the motion was properly overruled. *Railroad Company v. Harrell*, 58 Ark. 454, 472, a case much in point.

The testimony was conflicting as to whether the gong was rung to warn the deliveryman of the approach of the plaintiff's car. The court charged that that question bore exclusively on whether the defendant had anything to do with obstructing the track and creating the condition that plaintiff claimed occasioned her injury; that if the ringing of the gong would have prevented the obstruction by deterring the deliveryman from crossing the track, and it was not rung, the obstruction was a negligent act on the part of the defendant.

This was error, for it does not follow as matter of law that the motorman was negligent merely because the ringing of the gong would have prevented the obstruction, for the inference of negligence was not necessarily contained in that finding, and therefore the finding was not so decisive of negligence that it could be ruled as matter of law. It was a question of fact, and should have been submitted to the jury.

However it might be as to the deliveryman, as to the plaintiff, who was a passenger, it cannot be said as matter of law that the motorman had a right to assume that the deliveryman would keep along as he was, and not attempt to cross the track "mid block." His duty to her required of him the most watchful care and the most active diligence for her safety. *Hadley v. Cross*, 34 Vt. 586; 2 Hutch. Carriers, 3d ed., sec. 893. Whether he performed this duty or not was, in the circumstances, a question of fact.

The other questions are not considered, for some of them are not likely to arise again, and if others do, probably not in a way to present the same questions they now present.

Reversed and remanded.

EDWIN W. ROYCE v. NORRIS L. CARPENTER AND HENRY R.
TAYLOR.

May Term, 1904.

Present: ROWELL, C. J., MUNSON, WATSON, STAFFORD, and HASELTON, JJ.

Opinion filed May 10, 1907.

Bond for Deed—Title of Purchaser—Assignment—Title of Assignee—Estoppel—Knowledge of Facts—Reliance by Adverse Party—Laches—Nuisance—Equitable Relief—Water Power—Injury from Dam—Injunction.

A bond for a deed is a contract for the sale of real estate, and is assignable.

Under such a contract, the purchaser is the equitable owner of the land, and an assignee takes the same estate.

A court of equity will regard the substance, rather than the mere form, of an assignment, and will give it such effect as the parties intended.

The equitable owner of land gave a bond for a deed to a purchaser who paid part of the price, entered into possession, and later transferred the premises, by mere indorsement on the bond, to a third person who, after retaining possession for about seven months, surrendered it to said purchaser and returned to him the bond, with an indorsement reciting that the third person transferred the premises to said purchaser. Thereafter said purchaser trans-

ferred the premises, by mere indorsement on the bond, to the orator, who took and retained possession thereof. *Held* that these transactions amounted to a conveyance of the equitable estate to the orator.

On appeal, exceptions to a master's report that are not founded on objections made before the master will not be considered.

Where, on appeal in a suit in equity tried before a master, a certain document presented to the master is referred to in his report and made a part thereof, but neither the document nor a copy of it is furnished this Court, an exception to the master's report because of his ruling in respect thereof will not be considered.

In order to raise the question whether a master erred in receiving or rejecting evidence, his report must furnish the foundation for the question.

The question whether the master in receiving and considering certain questions and answers in a deposition, which were specifically objected to by defendants at the time of the taking of the deposition, will not be considered on appeal, where, although the master's report refers to the deposition for another purpose, it says nothing regarding any objection thereto, and the exception to the report refers to the deposition, but it is not furnished the Court.

He who relies upon an estoppel *in pais* must show an express or implied representation and reliance and action thereon to his injury, in ignorance of the truth.

An upper mill owner who, without making objection, saw a lower mill owner expend his money in building a dam and mill, and himself furnished timber for the dam, is not estopped by acquiescence or laches from asserting his rights against the lower mill owner because of his setting back water and thereby injuring the water power of the upper mill, where it appears that when he furnished the timber he did not know what would be the effect of the construction of the dam, and the lower mill owner did not rely on the conduct of the upper mill owner.

In order that acquiescence in wrongful acts shall operate to preclude one from obtaining relief therefor, the acquiescence must be not only with knowledge of the wrongful acts, but also of their injurious consequences, and this must last for such an unreasonable length of time as to make it inequitable to enforce equitable remedies against a wrongdoer.





In order that laches shall operate to preclude one from obtaining equitable relief against the wrongful act of another, it must appear that the latter changed his situation after the former had knowledge that he would be damaged by such wrongful act.

A court of equity will redress an injury resulting from a private nuisance only where the injury cannot be adequately compensated by damages at law, or where from the continuance of the nuisance a constantly recurring grievance results which can be prevented only by an injunction.

In a suit in equity for relief from injuries sustained because of the maintenance of a dam, causing backwater to interfere with the orator's mill wheel, it appeared that the water was frequently set back upon the orator's mill wheel so as to interfere with its operation, and that the damage would continue to a greater or less extent, dependent upon the character of the orator's mill and the amount of business done there, as long as the dam was maintained at its present height. There was no evidence of the comparative values of the properties affected, nor of the balance of convenience in granting or refusing equitable relief. *Held*, that equity would perpetually enjoin the maintenance of defendant's dam so as to interfere with the orator's water power.

APPEAL IN CHANCERY. Heard on the pleadings, master's report and exceptions thereto, at the June Term, 1903, Windsor County, *Tyler*, Chancellor. Exceptions overruled, and decree for the orator establishing the line between the orator and the land of Agatha Moore upon which defendant's mill stands, at the place reported by the special master, enjoining defendants from flooding the orator's land, and for the orator to recover twenty-five dollars, damages to the time of the bringing of the bill, and his costs. The defendants appealed. The foregoing is the plan referred to in the opinion:

W. W. Stickney, John G. Sargent, and Homer L. Skeels for the orator.

Gilbert A. Davis and Waterman & Martin for the defendants.

The master erred in receiving the testimony of Frederick A. Butler as to conversations and a contract between him and W. H. Sawyer. That was a contract in issue and on trial. *Davis, Admr. v. Bank*, 48 Vt. 538; *Pember v. Congdon*, 55 Vt. 58; *Hall v. Hamblet*, 51 Vt. 589; *Merrill v. Penney*, 43 Vt. 605; *Randall, Admr. v. Randall*, 64 Vt. 419; *Farmers' Mut. Fire Ins. Co. v. Wells*, 53 Vt. 14; *Fitzsimmons v. Southwick*, 38 Vt. 509; *McElroy v. McLevy*, 71 Vt. 398.

The orators are precluded from equitable relief by laches and acquiescence. *Greene v. Smith*, 57 Vt. 268; *Gould, Waters, §530*; *Pratt v. Lamson*, 2 Allen 275; *Prentiss v. Wood*, 118 Mass. 589; *Angell, Watercourses*, §328; *Wendell v. VanRenselear*, 1 John. Chan. 353; *Ottaquechee Woolen Co. v. Newton*, 57 Vt. 468.

WATSON, J. The allegations of the bill show that for some years the orator has been and now is the owner of a certain sawmill on the northerly bank of Black River in the town of Plymouth, together with the water privilege and the land connected therewith, the same being occupied and used by him for lumbering purposes; which premises are bounded on the south by land formerly owned and occupied by William Earle, and on the east by land formerly owned by Agatha M. Moore. It appears from the report that in earlier days the land about the orator's mill and owned in connection with it, was called the "Briggs millyard." The allegations further are that the orator holds a bond for a deed and is in possession of the land above referred to as formerly owned and occupied by William Earle. This land is on the south side of the river against and extending below the orator's mill, and is bounded on the north by the river. It is called the Ormsby or Earle lot, but hereinafter reference will be made thereto as the Earle lot.

The defendants, having purchased of Agatha M. Moore the land bordering the orator's mill property on the east, and known as the Shaw lot, in 1900 erected a dam across the river a short distance below the orator's dam and mill, and thereby flowed some of the Earle lot to his damage, and also set back the water in the river so as to flow his land and injure his water-power and sawmill. The orator prays that the defendants may be enjoined from thus overflowing his land and injuring his water-power and sawmill, for an account to be taken of the damages, and for general relief.

September 28, 1899, John A. Woods owned the equitable title to the Earle lot, and it became his by deed July 31, 1900. On the former date he gave a bond for a deed of the same to Joseph M. Dyer who paid forty dollars towards the purchase price and entered into possession of the property. November 6, 1899, Dyer and his wife transferred the same by indorsement on the bond to Orlando L. Coolidge, the latter taking possession. He retained the possession until June 11, 1900, when he surrendered it to Dyer and gave him the bond, there being no transfer in writing, except that Coolidge placed thereon in writing, "I the said O. L. Coolidge transferred to the said J. M. Dyer, June 11, 1900." September 4, following, Dyer and wife transferred the same, by indorsement on the bond, to the orator who took possession of the place and has retained it ever since. The bond and transfer to the orator were recorded in the land records of the town. On the first day of the next month a payment fell due on the bond. This and all subsequent payments falling due thereon to the time of the hearing before the master, were made by the orator. The bond was a contract for the sale of land, and assignable. Under such a contract the purchaser is treated in equity as the equitable owner of the land, and an assignee takes the same equitable estate.

It is said that Dyer and wife, after their transfer to Coolidge, had no legal title to the contract and hence they could assign no interest therein to the orator. The assignment back to Dyer, though informal, was written by Coolidge on the bond. In connection therewith he gave the bond to Dyer and surrendered the possession of the property. By this transaction the parties intended manifestly that all the equitable rights in the property under the contract owned by Coolidge should be assigned to Dyer. A court of equity will regard the substance, rather than the mere form of the assignment, and give it such effect as the parties intended. Under the subsequent assignment from Dyer and wife the orator has the same rights.

Shortly before Dyer transferred the bond to Coolidge, the defendant Carpenter applied to them for the privilege of flowing the water of the river upon the Earle place, if the defendants should erect their dam as it is now located. Wood, Dyer, and Carpenter met near the place of the dam and verbally agreed that the defendants might build their dam of the height later

set forth in the deed from Wood to them, dated June 6, 1900, on Carpenter's paying twenty-five dollars to be applied on the bond to Dyer. At some time the twenty-five dollars was paid by Carpenter to Wood, but it was never indorsed on the bond. When the bond was assigned to Coolidge he had notice of the agreement with Carpenter and consented to it. The record does not show that the orator, at the time of his purchase of the bond, had actual notice of this agreement or of such payment, but facts are found touching the question of constructive notice. The damages to the Earle land are reported separately, and the question whether on the facts found the orator was entitled to recover the same was submitted to the court. The court below disallowed these damages, thereby impliedly holding the orator chargeable with constructive notice. Since in this no claim of error is made we pass to the other branch of the case.

The determination of the true location of the division line between the land of the orator and the land of the defendants is essential to the decision of the case. The orator claimed before the master that it was the southerly portion of line iv to 7 on the plan marked "Batchelder's Plan," and if not this line, then the line 3 to 4 to 8 on the same plan, or a line near them. This line as first above given strikes the south bank of Black River about fourteen rods southerly of the foundation of the old sawmill which stood pretty near where the orator's present mill stands. The defendants claimed the true line starts on the south bank of the river four rods or nearly that distance below the orator's mill. The master finds that the original line between the "Briggs millyard" and the Shaw lot was the southerly end of the line iv to 7 laid down on the plan and that in the early days the "Briggs millyard" came down the river to that line. The defendants did not seriously question this, but contended that about 1831 there was a change made in the location of the line so that it commenced on the south bank of the river, four rods or about that distance down stream from the foundation of the Briggs sawmill as it then existed. But from all the evidence the master was unable to find that the line was ever changed from where it originally ran, and he finds the line, commencing at point 7 on the plan and running toward point iv as far as the road or wall to be the true line between the parties.

It is said, however, that the master reached this conclusion by an erroneous construction of Ex. 27, a deed from Franklin Prior to Walter Fletcher, dated January 25, 1831. The master construed this deed as conveying one undivided half of the Shaw lot, whereas the defendants say it should have been construed as conveying the whole lot. The defendants objected to the construction given because they said that when properly construed the title to the Shaw lot and to the Briggs mill lot merged in Fletcher and that he made a change in the division line between them. The master says such merger could not have been, for the title to the Shaw property was in Prior and Fletcher and they conveyed it September 20, 1831, by their warranty deed to I. P. Brown, bounding it on the up-river side by the Briggs saw-mill yard.

If the master's construction is right there could be no such merger of title as defendants claim. Nor could there be if his construction is wrong: June 29, 1825, Asa Briggs conveyed the mill-lot to Asa Briggs, Jr. The findings show that the land thus conveyed included the "Briggs millyard," extending down the river to the "original line" between it and the Shaw lot. No further change of title appears until October 23, 1828, when Asa Briggs and Asa Briggs Jr. conveyed the property to Walter Fletcher, the point of beginning named in the deed being "about four rods south of the sawmill, thence northerly across the road to I. P. Brown's land." With the point of beginning and the easterly line as thus given, Fletcher took by that conveyance no title to the land between the two lines here claimed by the respective parties,—that remained in Asa Briggs Jr. or in him and his father. January 25, 1831, Fletcher conveyed the mill property by the same description to Franklin Prior, and Prior on the same day executed to Fletcher exhibit 27, before noticed. There was still the land between the two lines owned by neither Prior nor Fletcher, and as an inevitable sequence to defendants' position there could have been no merger of title. Nor could there be a resulting merger from the orator's predication that the easterly line of the millyard has always remained the same. For then under the conveyances of January 25, 1831, Prior took the mill lot and Fletcher the Shaw lot with the original dividing line between them. In either view therefore the defendants' objection to the master's construction of deed exhibit 27, regard-

ing its force as evidence bearing on the line in question,—and it was in this respect that the objection was made,—is without force. No other objection is available under the exception. *Sargent v. Burton*, 74 Vt. 24, 52 Atl. 72; *Bourne v. Bourne*, 69 Vt. 251, 37 Atl. 1049; *Allen's Admr. v. Allen's Admrs.*, 79 Vt. 173, 64 Atl. 1110.

Defendants argue that other deeds were also misconstrued by the master, but be this as it may, no exception brings the matter before us.

The master further finds that the line on the plan drawn from 3 to 8 represents the division line between the orator's land and that of the defendants, by prescription. But in making this finding testimony was used given by one Frederick A. Butler, the orator's immediate grantor, showing a contract between him and Winslow H. Sawyer, a former owner of the Shaw lot and now dead, whereby for a consideration paid by the former to the latter, the line was established as above indicated, with subsequent use and occupation to the line thus established by Butler under a claim of right for more than fifteen years. Defendants objected to Butler's testifying to any contract with Sawyer, the latter being dead, and they stand on an exception to the report based thereon. It is unnecessary to consider the question thus raised, since the original line as found by the master stands as the true line between the parties. It is for the same reason unnecessary to consider the questions argued relating to the admissibility of any of the testimony of this witness bearing on the existence of the prescriptive line, including his acts and declarations concerning it.

It is further contended that all of the testimony given by Butler should have been excluded from consideration, for the reason that he was not present after the close of the hearing before the master, to be further cross-examined. The witness was examined and cross-examined before the master fully. When the hearing there was closed each party reserved the right to take the depositions of one or two persons, and the defendants' solicitor said he wished to cross-examine Butler further and reserved that right. No further cross-examination was had. Whose fault it was the master had no knowledge. The master states that a copy of a subpoena for taking the depositions of Abram Merrill and Butler was sent him by defendants' solicitor,

claiming it showed the orator in fault for defendants' not having Butler's deposition to use. He further states that no service of the subpoena on Butler was shown by the copy, and he could not find from it that it was the fault of the orator that the deposition was not taken. The exception to the report in this regard is because the master was misled as to the character of the document relating to the taking of the deposition—that it was not a subpoena, but a citation served on defendants to be present at the taking of Butler's and Merrill's depositions by the orator, and therefore it was incumbent on the orator to show why Butler's deposition was not taken accordingly. The paper thus in question was made a part of the master's report, but neither it nor a copy has been furnished the Court. Hence we cannot say that the master was in error.

Exception was saved to the report because the master received and considered in Merrill's deposition questions and answers specifically objected to by defendants at the time of the taking. Although the report makes reference to the deposition for another purpose, it says nothing regarding any objection thereto, nor has the deposition been furnished. The exception refers to the deposition. Several other exceptions were taken to the report because the master received or rejected certain pieces of testimony. The report does not show that any objections were made before the master on which these exceptions are based, nor does it refer to the transcript of testimony for that purpose. Reference is made to the transcript in defendants' exceptions, but this does not bring it before the Court. *Sowle's Admr. v. Sartwell*, 76 Vt. 70, 56 Atl. 282. These exceptions, therefore, including those relating to the deposition, are not considered.

The defendants began to erect their dam in May, 1900. At that time the orator was in the South, returning the last days of June. He then knew defendants were erecting their dam and sawed or caused to be sawn in his mill some timber to be used in the dam. It is urged that the orator's conduct in this respect together with his standing by and seeing defendants expend their money in building the dam and mill, without making objection, constitutes such acquiescence and laches on his part as will estop him in equity from asserting his rights here claimed. The master states that there was no evidence that the material was fur-

nished with such knowledge of what the effect of the erection of the dam and mill would be upon the orator's mill as estops the latter from relief in the premises. Nor was any finding made that the defendants relied upon the conduct of the orator in this behalf, or were thereby influenced in their actions. There can be no estoppel unless the party alleging it relied upon the representation,—whether in words, acts, or silence,—of the party to be estopped, was induced to act by it, and thus relying and induced, did take some action. *Wooley v. Edson*, 35 Vt. 214; *Wells v. Austin*, 59 Vt. 157, 10 Atl. 405; 2 Pom. Eq. Jur. sec. 812.

Nor was there such acquiescence in the wrongful acts of the defendants by the orator as will operate, on principles of and in analogy to estoppel, to preclude him from obtaining equitable relief, leaving him to his remedy at law. To have this effect the acquiescence must be not only with knowledge of the wrongful acts themselves, but also of their injurious consequences, and it must last for such an unreasonable length of time as to make it inequitable to the wrong-doer to enforce the remedies of equity against him after being suffered to go on unmolested and with apparent acquiescence in his conduct. Here the orator's knowledge of the injurious consequences is negatived by the findings, hence there is no *quasi* estoppel. 2 Pom. Eq. Jur. sec. 817; *City of Logansport v. Uhl et al.*, 99 Ind. 531; *Bausman v. Kelley*, 38 Minn. 197, 8 Am. St. Rep. 661. It is the use of the dam, not its erection, that is an interference with the orator's rights (*Dutton v. Stoughton*, 79 Vt. 361, 65 Atl. 91), hence without knowledge of the injuries consequent on use he would have no knowledge that a wrong had been committed. That one cannot acquiesce in a wrong while ignorant that it has been committed is too self-evident to require further discussion.

Nor is the case presented one where the doctrine of laches should be applied. No facts are found showing any change of situation by the defendants after the orator had knowledge that he would suffer damages arising from backwater and before the commencement of these proceedings, ten and one-half months later. In these circumstances it cannot be said that the delay was so prejudicial to the defendants as to render it inequitable for the orator now to assert his rights. *Halstead v. Grinman*, 152 U. S. 412, 38 L. ed. 495.

Finally, defendants contend that all damages which the orator has or will suffer from backwater can be fully and adequately compensated by a pecuniary sum, and that to grant a perpetual injunction is inequitable. It is found that up to the time of bringing this suit the orator had suffered by the erection and maintenance of defendants' dam twenty-five dollars; that when the water is high, so as to flow over the dam six inches or more to one or two feet, as it frequently does, the water sets back on orator's wheel so as seriously to obstruct it and render it impossible to obtain sufficient power to run his sawmill to any advantage; and that the damage will continue to a greater or less extent dependent on the character of the orator's mill and amount of business he can command, as long as defendants maintain their dam at its present height. Nothing appears regarding the comparative values of the properties affected, nor as to the balance of convenience or inconvenience in granting or withholding such injunction.

Courts of equity do not always as a matter of course afford relief by way of injunction in cases of this nature where a right of action exists for a nuisance. In the case of *Ottaquechee Woolen Co. v. Newton*, 57 Vt. 451, the orator sought such relief against the defendants' erection of a dam which would set the water back on its wheel, but an injunction was refused. The defendants had been to great expense in the purchase of property, and in making preparations to build up an extensive manufacturing business, prospectively of great public benefit. It was there said that in determining whether an injunction should be granted or denied, the court should take a broad and comprehensive view of the situation and ascertain if it will be equitable to grant it. The refusal of the writ was placed on two grounds, one of which was that the anticipated trouble from backwater could nearly, if not quite, be obviated by the substitution of a different wheel from the one then in use by the orator, and that the expense of such substitution would be small as compared to the loss of defendants by being deprived of the right to utilize their water power. In *Dutton v. Stoughton*, to which reference has been made, an injunction was granted, but no question was made respecting the nature of the relief.

Equitable jurisdiction regarding private nuisances is based upon the ground of restraining irreparable mischief, or of pre-

venting vexatious litigation or a multiplicity of suits. But to justify the interposition of a court of equity to redress the injury or remove the annoyance "there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction." 2 Story, Eq. Jur. sec. 925; Kerr on Injunctions, 225; Gould on Waters, sec. 528; *Imperial Gas Co. v. Broadbent*, 7 H. L. 600; *Holsman v. The Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243.

Applying these principles to the circumstances presented by the case before us, clearly an injunction should issue. The findings show an injury not only from the essential nature of which, but also from its continuous character, the legal remedy is inadequate,—one which cannot be prevented otherwise than by an injunction.

Decree affirmed and cause remanded with mandate.

JOHN S. WILKINS v. SAMUEL SOMERVILLE ET AL.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed May 10, 1907.

Deeds—Escrows — Conditions — Performance — Conveyance by Vendor to Third Party—Notice—Effect—Specific Performance—Bill—Sufficiency—Amendment — Injunction Against Withdrawing Escrows.

In equity during the existence of a valid contract for the sale of land, the vendor holds the title to the land in trust for the vendee, who

is himself trustee for the vendor as to the purchase money, and any purchaser from either, with notice, is subject to the same equities as his vendor.

Where a grantor, in fulfilment of his agreement with the grantee, deposited a deed of his farm in escrow, to be delivered to the grantee upon payment by him of a specified sum of money, but before a reasonable time for payment had elapsed and before delivery of the deed to the grantee, the grantor conveyed the farm to another, the original grantee's proper remedy is in equity.

Where the grantor deposits the deed in escrow for delivery to the grantee, he can annex such conditions to its delivery as he chooses, and the fact that in doing so he violates the terms of his contract with the vendee does not give the deed any additional force, and hence, no title could pass by it without a compliance with the conditions of the deposit.

A contract by which a grantor agreed to deposit in escrow a deed of his farm, to be delivered to the grantee on the payment by him of a specified sum of money, is not objectionable for uncertainty though it specifies no time within which the payment shall be made, since by implication payment must be within a reasonable time.

In these circumstances, where the grantor conveyed his farm to another before such reasonable time for payment had elapsed, equity requires that the original grantee have a reasonable further time within which to make payment and receive his deed, unless the right of a *bona fide* purchaser has intervened.

Where the purchaser of land knew that his grantor had deposited in escrow a deed of the land to be delivered to the grantee on payment by him of a specified sum of money, and was put upon inquiry by the existence of an injunction restraining the depository from surrendering the deed to the grantor, he stands in the same equity as his grantor, and incurs the latter's obligation to fulfil the contract with the original grantee.

Where a bill in equity to compel specific performance of a contract to convey land fails to show the orator ready and willing or that he offers to perform, if in all other respects a case of specific performance is established, the court will not deny relief without an opportunity to the orator to move for leave to amend his bill.

In a suit in equity to compel specific performance of a contract, whereby defendant agreed to deposit in escrow a deed of his farm, to be delivered to the orator upon payment by him of a specified sum of money, where it appears that defendant threatened to withdraw the deed from the depository before a reasonable time for payment had elapsed, a temporary injunction holding the deed and the title to the farm *in statu quo* was properly issued.

APPEAL IN CHANCERY, Chittenden County. Heard at Chambers, August 2, 1906, *Miles*, Chancellor, on the pleadings, master's report and exceptions thereto. Decree dismissing the bill with costs to the defendants. The orator appealed. The opinion fully states the case.

H. S. Peck for the orator.

M. M. Gordon and *George W. Wing* for the defendants.

Defendants had the right to annex such conditions as they chose to the deposit of the deed in escrow. *Mechanics Nat. Bank v. Jones*, 76 App. Div. Rep. 535; *Belle v. Foreman*, 37 Ohio St. 139; *Campbell v. Thomas*, 24 Am. Rep. 427; 1 Devlin, Deeds, §324.

The deed takes effect only from the time of its delivery and where a deed is placed in the hands of a third party as an escrow, the grantee is only entitled to a delivery of the deed upon a strict compliance with the terms of the agreement, which was clearly a condition precedent to its delivery. *Dyson v. Bradshaw*, 23 Cal. 528; *Beam v. McKusick*, 10 Cal. 538; *Smith et al. v. South Royalton Bank et al.*, 32 Vt. 341.

Where a deed is deposited in escrow, the depository is the agent of the grantor and of the grantee; and if the deposit is upon conditions to be performed by another, and without original consideration, the person making the deposit may revoke his proposition at any time before the other person has complied with such conditions. *Mechanics' Nat. Bank v. Jones*, 76 N. Y. App. Div. 535. Affirmed in 175 N. Y. 518.

The making of a deed in escrow, presupposes a contract, pursuant to which the deposit is made; it implies an agreement between the grantor and the party who is to perform the con-

dition; and when one has agreed to convey when the condition is performed, and the other to perform the condition, and the deed has been placed in escrow, to carry out the purpose as defined in the contract or arrangement between the parties, without any reservation, expressed or implied, on the part of the grantor when the deposit is made, of a right to recall the deed, then the authorities are that the delivery cannot be revoked by the party making it, so long as there is no breach by the other of the condition upon which it was made. *Graham v. Graham*, 1 Ves. Jr. 272; *Miller v. Parker*, 2 Metc. (Key) 616; *Cook v. Brown*, 34 N. H. 476; *Shirley v. Ayers*, 14 Ohio 308; *Washburn Real Prop.* 268; *Story Eq. Jur.* 703.

The rule of law seems to be well settled, that when one party has been guilty of gross, vexatious, unreasonable, or unnecessary delay or default in relation to it, the other party becomes entitled, by notice, to limit a reasonable time within which the contract shall be performed by the other, and in default of obedience to such notice, the court will not enforce specific performance, but will leave the parties to their strictly legal rights. *Miller v. Rice*, 133 Ill. 315; *Wiswell v. McGowan*, 1 Hoff. Ch. 125; *Bullock v. Adams' Exrs.*, 20 N. J. Eq. 367; *Fry on Specif. Perf.* §1062; *Burnap v. Sharpstein*, 149 Ill. 225.

WATSON, J. On January 16, 1902, a contract was made between the orator and the defendant Samuel Somerville by which it was agreed that the orator should pay the sum of six thousand dollars for that part of Somerville's farm lying in Duxbury, containing his homestead, and that the deed thereof when made should be deposited with the Capital Savings Bank and Trust Company in Montpelier, in escrow, until that sum should be paid. The farm was believed by both to contain valuable veins of asbestos and talc, and this they had in view in their negotiations. On the same day a warranty deed of the property was duly executed by Samuel and his wife, the defendant Eliza M. Somerville, to the orator, and was deposited by the direction of Samuel with the bank in escrow, but instead of the condition being pursuant to his agreement with the orator, he directed the depository to hold the deed until six thousand dollars should be deposited to his credit, or until called for by him or his attorney, after thirty days from date.

The orator neither consented to nor had any knowledge of any change in the condition, nor was he afterwards informed of it. Indeed never thereafter did Samuel make reference to the time the deed should remain in the custody of the bank, until September 19, when he wrote the orator that after thirty days he should think best to take it therefrom. Again October 6, he in like manner notified the orator that the date for withdrawing the deed was October 20, advising him that what he did must be done before then. In answer to each of these communications the orator protested against its withdrawal. Later Samuel extended the date to October 30, and the depositary notified the orator that unless payment be made by that time, the deed would be returned to the vendor. Thereupon the orator protested to the latter that under their agreement he had no right to recall the deed. On the day before the bank was thus to return the deed an order was issued restraining it from so doing.

On the same day Samuel and wife by their deed of warranty conveyed the land, together with land in Fayston, to the defendant Mark Mears, who in making the purchase was co-operating with defendants George D. Mears, A. W. Slocum, and Mathew M. Gordon, it being understood and agreed between them that Mark Mears should furnish the money to pay for the property, hold the title, and transfer the same to a company to be formed by them. In this purchase the consideration to be paid was six thousand dollars, of which twenty-five hundred dollars was paid by check, with an agreement to pay the balance in sixty days. The deed to Mears was sent by him to the defendant Eber Huntley, town clerk of Duxbury, for record. Soon thereafter this suit was commenced, with a temporary injunction holding the deed and the title to the property in *statu quo*.

The vendor, when depositing the deed with the bank, undoubtedly was competent to annex such conditions to its delivery to the orator as he saw fit, even to the extent of retaining the right to withdraw it from the custody of the depositary at any time, or after a specified time. The fact that in so doing he violated the terms of his contract does not change the situation in this respect, nor give the deed any force which it would not otherwise have. *Stanton v. Miller*, 58 N. Y. 192. No title could pass by it without a compliance with the conditions of the deposit.

It is clear that the orator cannot have adequate remedy by an action at law. In view of the conveyance of the property to a subsequent purchaser the question is, what relief will be granted in a court of equity? The contract is in its nature and incidents entirely unobjectionable. True it contained no specified time in which the condition of the escrow should be performed; yet there was no uncertainty in this respect, since by implication performance must be within a reasonable time. *Ordway v. Farrow*, 79 Vt. 192, 64 Atl. 1116. It is found that such reasonable time had not elapsed October 30, 1902, the day finally named by the vendor for the withdrawal of the deed from the bank. Hence the conveyance of the property to Mears the day before was within the time in which the orator by his contract had a right to perform. Yet by that conveyance the vendor not only disabled himself from carrying out his prior contract, but he prevented its subsequent performance by the orator also. In these circumstances unless the rights of *bona fide* purchasers without notice intervene, equity requires that the orator be placed as nearly as possible in the same situation as the vendor agreed that he should be in,—that he have a reasonable further time in which to perform the condition and receive a deed of conveyance of the property according to the terms of his contract. See *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479; *Ordway v. Farrow*, before cited.

But the subsequent purchaser Mears was not without notice. Before he took his deed he knew all concerning the deed to the orator and was put on inquiry as to the restraining order against the bank, issued the same day. Hence Mears, standing on the same equity as his vendor, will be compelled to perform the contract with the orator by a conveyance of the land in the same manner and to the same extent as the vendor would have been liable to do, had he not transferred the legal title. 1 Story, Eq. Jur. secs. 396, 784; *Taylor v. Stibbert*, 2 Ves. Jr. 438; *Potter v. Saunders*, 6 Hare 1; *Champion v. Brown*, 6 Johns. Ch. 398; *Ten Eick v. Simpson*, 1 Sandf. Ch. 244; *Haughwout v. Murphy*, 22 N. J. Eq. 531.

This doctrine rests upon the general principle in equity that from the time of a contract for the sale of land, the vendor, as to the land, is considered a trustee for the purchaser, and the vendee, as to the purchase money, a trustee for the vendor.

And every subsequent purchaser from either, with notice, is subject to the same equities as would be the party from whom he purchased. 1 Story, Eq. Jur. sec. 789; *Taylor v. Stibbert*, 2 Ves. Jr. 439; *Ten Eick v. Simpson*, 1 Sandf. Ch. 244.

The prayer of general relief is sufficient. It is said in substance, however, that the bill does not show the orator ready and willing, nor that he offers, to perform. But since a case for specific performance has been made out in other respects, a court of equity will hesitate to deny such relief without an opportunity to the orator to move for leave to amend his bill.

In the event of such relief being granted, we do not understand that damages are here sought by the orator in addition thereto. Whether in case he does not avail himself of specific performance any claim he may have for damages or for money expended may be here enforced by way of a lien on the property or otherwise, is a question on which we give no intimation.

It sufficiently appears without further discussion that as far as the temporary injunction relates to the land in question it was properly issued to protect the orator's equitable rights in the premises; and with such modifications as may be necessary to the carrying out of the decree it should be made perpetual. Provided that if the orator fails to perform within the time limited, then the injunction should be dissolved for his failure to perfect his title under the decree.

To the extent that the injunction relates to other land, if at all, it was wrongfully issued and should be dissolved. Regarding such land the case will be proceeded with on the question of injunction damages if any are claimed.

The defendant Huntley has no interest in the matters here litigated, he being made a party to the suit only for purposes of the injunction.

Decree reversed and cause remanded with mandate. Let the costs below be there determined.

IN RE CONSOLIDATED RENDERING CO.

January Term, 1907.

Present: TYLER, MUNSON, and WATSON, JJ., and WATERMAN, Superior Judge.

Opinion filed May 11, 1907.

Contempt of Court—Power to Punish—Review—Habeas Corpus—Certiorari—Writ of Error—No. 75, Acts 1906—Constitutional Law—Searches and Seizures—Equal Protection of Laws—Unjust Discrimination—Witnesses—Self-Criminating Evidence—Nature of Privilege—Method of Asserting—Subpoena Duces Tecum—Effect—Foreign Corporations—Status—Evidence—Access to Corporate Books.

V. S. 1610, providing that one confined for contempt of a court, chancellor, judge, or other magistrate shall be entitled to a writ of habeas corpus returnable to the Supreme Court, has no application to a case where the penalty imposed is merely a fine.

Where contempt proceedings are taken to the Supreme Court by exceptions duly filed under V. S. 1625-1626, and the exceptions are sufficient to bring up the full record and to raise all questions that the respondent desires to present, a writ of certiorari is unnecessary.

Since V. S. 1625, providing that questions of law determined by the county court may be taken to the Supreme Court by exceptions, makes no reference to writs of error, their use remains as at common law,—not appropriate except where the county court exercises its jurisdiction substantially according to the course of the common law.

The only question that can arise on a review of a contempt proceeding in the Supreme Court is as to the jurisdiction of the lower court, since the power to punish for contempt is a discretionary power inherent in courts of law, and, if fairly exercised in a case within the jurisdiction of the lower court, its findings of fact are conclusive, and no review can be had.

No. 75, Acts 1906, providing that any corporation doing business in this State shall, upon notice, produce before any court, grand jury, tribunal, or commission acting under the authority of the State, all books, correspondence, memoranda, papers and data which may contain any account, reference, or information concerning the proceedings or subject of inquiry pending before the body, and which may at any time have been made or kept within the State and are in the custody of the corporation, or which relate to any transaction within the State or with parties residing or having a place of business therein; and providing for the manner of service of the order to produce and for punishment for contempt in case of non-compliance, is not in violation of the eleventh article of the Constitution of Vermont, relating to the search or seizure of property and the certainty of description in warrants therefor, since the Act restricts the order to such books and papers as contain information concerning the subject of inquiry, and leaves it for the tribunal to determine only what books and papers are needed and to describe them in the order as far as practicable.

An order issued under No. 75, Acts 1906, directing a corporation to produce before a grand jury certain books and papers, and sufficiently describing them, has the force of a subpoena *duces tecum*, and where it requires no search by the corporation to find the books and papers demanded, and entails no hardship to produce them, the order is not for an unreasonable search and seizure in violation of the eleventh article of the Constitution of Vermont, which does not abridge the power of a court to compel the production of documentary evidence in any proceeding therein.

When service was made, it was the duty of the respondent to cause the books and papers required by the order to be produced as therein directed, or give a reasonable and truthful excuse for their non-production, and *then* it could raise any objection to their use in evidence.

It is the duty of any witness summoned upon a subpoena issued in behalf of the State in a criminal case to appear according to the summons, without preliminary tender of his fees; hence an order issued under No. 75, Acts 1906, directing a corporation to produce certain documentary evidence before a grand jury, and contempt proceedings for a violation thereof, were not an infringement of the eleventh article of the Constitution of Vermont relating to the search and seizure of property, on account of the fact that no

tender was made of the fees and expenses for appearing before the court with the required evidence.

The common law immunity guaranteed by that provision of our State Constitution which declares that no one can be compelled to give criminating evidence against himself, is a privilege personal to the witness and, if relied upon, must be asserted by the witness himself in court and under oath; and even then, the statement of the witness that the answer will tend to criminate him is not necessarily conclusive, but presents a question for the determination of the court.

A witness cannot disobey a subpoena *duces tecum* and refuse to produce the books and papers when called for, and still claim through his attorney, that such books and papers, if produced, would tend to criminate him.

Where a witness has been duly summoned, it is his duty to attend at the time and place named in the subpoena, and if required to produce documentary evidence, it is his duty to produce it, if it is in his possession or control.

Whether the documentary evidence is relevant, or, if produced would tend to criminate the witness, is for the court, and not for the witness, to determine.

An order issued against a corporation, under No. 75, Acts 1906, directing it to produce certain documentary evidence before a grand jury, and contempt proceedings against the corporation for a violation thereof, were not contrary to the tenth article of the Constitution of Vermont, providing that no one can be compelled to give criminating evidence against himself, since the corporation was not a party nor charged with any crime, but simply summoned to appear before the grand jury with the documentary evidence, where the privilege could have been claimed if desired.

In a contempt proceeding for failure to obey an order to produce certain documentary evidence before a grand jury, where the petition in the proceeding contains no allegation relating to any claim of privilege or any incriminating testimony, the question of privilege on account of the tendency to incriminate cannot be raised by a motion to dismiss the petition, since a motion to dismiss is not issuable, and reaches only defects apparent on the face of the strict record.

The grand jury is a part of the court, and any question of privilege can be raised before that body, and reported to the court for its action.

Where a foreign corporation has complied with all the requirements of law relative to its doing business in this State, and is thus actually doing business here under the law of this State, in respect of all business done here, and all matters connected therewith, it is as much amenable to the laws of this State, and in duty bound to obey them, as though it were a domestic corporation.

If a foreign corporation doing business in this State under the authority of its laws, in anticipation of being called to produce its books and papers in a criminal proceeding against our own citizens, removes such books and papers from this to another state, it cannot be permitted to plead that act as an excuse for not obeying a subpoena to produce them.

The books and papers of a foreign corporation doing business in this State under authority of its laws, which are required as evidence in legal proceedings here, though they have been removed to another state by the corporation, are still, in contemplation of law, within the jurisdiction of our courts, since the corporation is within that jurisdiction and the books and papers are within the control of the corporation.

No. 75, Acts 1906, is not in violation of the Fourteenth Amendment of the Federal Constitution, as discriminating between corporations and natural persons, and denying to the former equal protection of the laws, it merely removes the prior discrimination and now requires of a corporation what could before be demanded of a natural person by subpoena *duces tecum*.

No. 75, Acts 1906, is not in violation of the Fourteenth Amendment of the Federal Constitution, as depriving the corporation of its property without due process of law, by authorizing a fine for contempt in case of refusal to produce documentary evidence when ordered, since the proceedings indicated for punishing the contempt are in accordance with the ordinary mode prescribed by law in such cases and adapted to the end to be attained.

Nor does No. 75, Acts 1906, take property without due process of law, in that it does not provide compensation for time, trouble, and expense in producing documents and papers from other states, since the law provides fees and mileage for witnesses, and any

loss from inadequate fees is incident to the legitimate exercise of the powers of government for the public good.

Under No. 75, Acts 1906, the county court has jurisdiction to fine a foreign corporation doing business in this State, for contempt in disobeying an order to produce its books and papers before a grand jury in an investigation of an alleged breach of a criminal statute by citizens of this State in their dealings with said corporation in Vermont.

PROCEEDING FOR CONTEMPT. Chittenden County, September Term, 1906. *Rowell*, C. J., presiding. The respondent was adjudged guilty of contempt and fined \$3,000. Exceptions by respondent; also petition for writ of certiorari, and petition for a writ of error.

The Consolidated Rendering Company is a corporation organized under the laws of the State of Maine, having its principal business office at Boston, Massachusetts, and carrying on a meat and rendering business plant at Burlington, Vermont, under the name of the Burlington Rendering Company.

At the September Term, 1906, of the Chittenden County Court, the grand jury of that county had under consideration certain charges against four persons named, members of the board of cattle commissioners of the State of Vermont, for having sold diseased meat for food purposes, at said Burlington, contrary to the statute of this State. October 10, 1906, said company was served by an officer with a copy of an order of said court to produce before the grand jury on the 17th day of said October, "all books of account, letters, accounts, memoranda, data, copies of bills, statements and copies of statements at any time made or kept or had by said company at said Burlington, which contain any account with, statement of, or relating to, or concerning any deal or business with any of the following parties since January 1st, 1904, (naming the four persons) or with the cattle commissioners of the State of Vermont, or with the State of Vermont; also all books, vouchers and receipts issued by your company, or by any officer or employee of your company at said Burlington since January 1, 1904, to any of the above named parties; also all statements, correspondence, data, memoranda, books, vouchers, and receipts, made or kept at said Burlington, which relate to the payment by your company to any of

the above parties on the following dates and for the amounts specified opposite each date",—and here followed some over forty dates and amounts, commencing January 4, 1905, and ending June 29, 1906, and "to be used as might be legally admissible before the grand jury relative to the matter of complaint pending, and there to be investigated before said grand jury in which" (said four persons) "are charged with having unlawfully sold diseased meat for food purposes at said Burlington."

The alleged contempt was for the refusal to produce the documentary evidence. The proceedings are sufficiently set forth in the opinion.

R. E. Brown, W. B. C. Stickney, J. J. Enright, Freedom Hutchinson, and Albert S. Hutchinson for the respondent.

Questions of law arising in contempt proceedings are reviewable in a higher court in at least two classes of cases:

1st. Where the contention is made that the court below was without jurisdiction to make its order and render its judgment, because the statute under which it purported to act was unconstitutional and void.

2d. In cases where the act of contempt charged is innocent or justifiable, and the proceedings below were so irregular as to be against law, and to give the court no proper jurisdiction.

Contempt proceedings may be reviewed by a bill of exceptions. *In re Cooper*, 32 Vt. 252; *Androscoggin etc. Co. v. Androscoggin Co.*, 49 Me. 392.

Contempt proceedings may also be reviewed by writ of certiorari. *In re Chetwood, Petitioner*, 165 U. S. 443; *People v. Kelly*, 24 N. Y. 74; *Hummels' Case*, 9 Watts 416; *Com. v. Newton*, 1 Grant 453; *State v. Judges*, 32 La. Ann. 1256; *Harrison v. State*, 35 Ark. 458; *Dunham v. State*, 6 Iowa 245; *People v. Turner*, 1 Cal. 156; *Ex parte Field*, 1 Cal. 187; *Ex parte Biggs*, 64 N. C. 202; *State v. Leftwich*, 41 Minn. 42; *Warner v. State*, 13 Lea 52.

In the following cases contempt proceedings were reviewed by writ of error: *Telegram Newspaper Co. v. Com.*, 172 Mass. 294; *Hurley v. Com.*, 188 Mass. 443; *Globe Newspaper Co. v. Com.*, 188 Mass. 449; *Hundhausen v. Ins. Co.*, 5 Heisk. 702; *Remley v. DeWall*, 41 Ga. 460; *Vertner v. Martin*, 10 Sm. & M.

103; *Stanart v. People*, 3 Scam. 395; *Harnes v. People*, 97 Ill. 161; *Railway v. Wheeling*, 13 Gratt. 40; *Ingle v. State*, 8 Blackf. 574; *Birkley v. Com.*, 2 J. J. Marshall 572; *Middlebrook v. State*, 43 Conn. 257; *Tyler v. Hammersley*, 44 Conn. 393.

The relations of the Rendering Company to the subject of inquiry before the grand jury make it plain that the production of the documents called for might tend to incriminate the defendant or subject it to indictment or prosecution. *Counselman v. Hitchcock*, 142 U. S. 547; *Ballman v. United States*, 200 U. S. 186; *Chamberlain v. Willson*, 12 Vt. 481; *Janvrin v. Scammon*, 29 N. H. 280; *People v. Forbes*, 143 N. Y. 219; *Emery's Case*, 107 Mass. 172; *State ex rel. Atty. General v. Simmons etc. Co.*, 109 Mo. 118; *People v. O'Brien*, 176 N. Y. 351; *In re Cullinan*, 82 App. Div. 445; *State v. Slamon*, 73 Vt. 212; *Ex parte Clarke*, 103 Cal. 352; *Ex parte Cohen*, 104 Cal. 524; *Lamson v. Boyden*, 160 Ill. 613; *Ex parte Carter*, 166 Mo. 604; *Smith v. Smith*, 116 N. C. 386; *Boyle v. Smithman*, 146 Pa. St. 255; *Ex parte Wilson*, 39 Tex. Cr. 630.

The statute is in contravention of the eleventh article of our Constitution relating to searches and seizures. *Boyd v. U. S.*, 116 U. S. 616; *Hale v. Henkel*, 201 U. S. 43; *In re Pacific Railway Co.*, 32 Fed. 241; *Lester v. People*, 150 Ill. 408; *Ex parte Brown*, 72 Mo. 143; *Carson v. Hawley*, 82 Minn. 204; *Newberry v. Carpenter*, 107 Mich. 567; *Cooley*, Const. Lim. (7th ed.) 424.

The statute is in conflict with the Fourteenth Amendment of the Federal Constitution, in that it authorizes the depriving a corporation of its property without due process of law, either by taking its books and papers, or by taking its property by way of fine for nonproduction. *State v. Height*, 117 Iowa 650; *West v. Louisiana*, 194 U. S. 258.

The statute provides no compensation for the time, trouble, and expense of producing books and papers from other states, and this is taking property for public use without just compensation. *Woodward v. C. V. Ry.*, 180 Mass. 599; *Chicago etc. Co. v. Illinois*, 201 U. S. 595; *Wilson v. United Traction Co.*, 76 N. Y. Supp. 203; *Blythe v. State*, 4 Ind. 525; *Gridley v. Bloomington*, 88 Ill. 554; *Webb v. Baird*, 6 Ind. 13; *Chicago v. O'Brien*, 111 Ill. 532; *State v. Jackman*, 69 N. H. 318.

Clarke C. Fitts, Attorney General, and *A. L. Sherman*, State's Attorney, for the State.

A subpoena *duces tecum* is a writ of compulsory obligation. *Amey v. Long*, 9 East. 475; *Corser v. Dubois*, 3 Eng. Com. Law Rep. 101; *Bull v. Loveland*, 10 Pick. 9; *Lane v. Cole*, 12 Barb. 680.

The findings of fact made by the lower court are conclusive. 1 Grant C. S., Pa. 453; *Water Co. v. Court of Fresno Co.*, 93 Cal. 139; *Clark v. People* (Ill.) 12 Am. Dec. 177; *Cochran v. Ingersoll*, 73 N. Y. 613; *Tyler v. Hammersley*, 26 Am. Rep. 471; *Hunter v. State*, 6 Ind. 423; *Hayes v. Fischer*, 102 U. S. 121; 10 Century Digest, 2587; *Vilas v. Burton*, 27 Vt. 60, 22 Am. St. Rep. 417.

Law in its regular course of administration through courts is *due process*, and when secured by a law of the state, the constitutional requirement is satisfied, and that due process is so secured by laws operating on all alike. *Leeper v. Texas*, 139 U. S. 462; 2 Kent's Com. 13; *Marchant v. R. R. Co.*, 153 U. S. 390.

The prescribing of different modes of procedure, leaving untouched all the substantial protections with which the existing law surrounds the person, are not considered within the constitutional prohibition. *Duncan v. Miss.*, 152 U. S. 377.

What is due process of law in the states is regulated by the law of the state. *Walker v. Sauvinet*, 92 U. S. 90; *Hayes v. Miss.*, 120 U. S. 71; *Miss. v. Lewis*, 101 U. S. 22; *Brown v. N. J.*, 175 U. S. 175.

Forms of procedure in the state court are not controlled by the fourteenth amendment, provided the nominal rights secured by the amendment are not denied. *Ex parte Reggel*, 114 U. S. 642; *R. R. Co. v. Iowa*, 160 U. S. 389; *R. R. Co. v. Chicago*, 166 U. S. 226.

Due process of law within the meaning of the fourteenth amendment is secured if the laws operate on all alike and do not subject the individual to the arbitrary exercise of the powers of government. *Giozza v. Tiernan*, 148 U. S. 657; *R. R. Co. v. Mackey*, 127 U. S. 205; *R. R. Co. v. Herrick*, 127 U. S. 210.

WATERMAN, Superior Judge. The respondent has adopted three methods of bringing the case before this court for reviewing the proceedings of the county court. Exceptions were taken to the rulings of the court, which were duly filed; a petition for a writ of certiorari was filed in this Court; and also a petition for a writ of error. It is of no importance in this case which of the first two methods is deemed the more appropriate, nor would a discussion of the methods pursued in other jurisdictions be beneficial. We have a statute under which such a case may be taken to the Supreme Court on exceptions, V. S. 1625. It is true our statute, V. S. 1610 to 1612 provides for bringing contempt proceedings before this Court by habeas corpus, but of course that applies only to cases where the relator is actually in confinement for noncompliance with some order of court. It can have no application in a case like this. A writ of certiorari is unnecessary in this case, as the exceptions are sufficient to bring up the full record, and to raise all questions which the respondent desires to present. Section 1625 has no reference to writs of error, hence their use in this respect remains the same as before the law of that section was enacted,—not appropriate except where the county court exercises its jurisdiction substantially according to the course of the common law. *Beckwith v. Houghton*, 11 Vt. 602; *Stiles v. Windsor*, 45 Vt. 520.

It is conceded by counsel for the respondent that the findings of fact by the court below are conclusive, and the authorities are abundant as to this. It is also conceded that the power to punish for contempt is inherent in courts of law, and their action is not reviewable if within their jurisdiction. The power to punish for contempt is a discretionary power, and must be fairly exercised, and when so exercised in a case within the jurisdiction of the court no review can be had. So really the only question here, is as to the jurisdiction of the court.

The grand jury was engaged in the investigation of an alleged breach of a criminal statute by certain persons in this State, and in the course of those inquiries an order was made upon the respondent company by the court, under the provisions of the statute, to produce the books and papers mentioned in the order. The company produced some books and papers, but not all those required, and the grand jury having reported

to the court the neglect of the company to produce the requisite documents, a complaint was filed by the Attorney General and the company was summoned before the court to show cause why it should not be dealt with for contempt.

These proceedings were had in pursuance of a statute of this State passed by the Legislature at its session held in 1906, the first section of which is as follows:

"Any corporation doing business within this State whether organized under the laws of this or any other State or country, shall, when notice thereof is served upon it according to the provisions of this act, produce before any court, grand jury, tribunal or commission, acting under the authority of this State, all of the books, documents, correspondence, memoranda, papers and data which may contain any account of, reference to, or information concerning, the suit, proceeding, action, charge, or subject of inquiry pending before, or to be heard or determined by such court, grand jury, tribunal or commission, and which have at any time been made or kept within the State of Vermont, and are in the custody or control of such corporation within this State or elsewhere at the time of such notice upon it."

The second section is identical with the first except that the books and papers mentioned are limited to those "which in any way relate to, or contain entries, data or memoranda concerning any transaction within the State of Vermont or with any party residing or having a place of business within the State of Vermont." The third section relates to the manner of service of the order to produce; the fourth provides for punishment for contempt in case of non-compliance with the order, and that execution may issue for the collection of any fine imposed. These sections are all that are of importance in this case.

The respondent claims that the court had no jurisdiction because the statute is unconstitutional. It is claimed that this statute contravenes the provisions of the tenth and eleventh articles of the Constitution of Vermont, and of the fourteenth amendment to the Constitution of the United States.

1. It is insisted by the respondent that the act is in contravention of the eleventh article of the Constitution of Vermont, in that it authorizes a search and seizure of books and papers of a corporation; and also because it compels the production of such books and papers in court without providing compensation

for the time and expense in so doing. It is claimed that the act is not restricted, as it should be, to permitting such books and papers as are admissible, to be called for, but includes all in the custody or control of the corporation.

The act restricts the order to such as "contain any account of, reference to, or information concerning the suit, proceedings, action, charge or subject of inquiry, pending before, or to be heard by such court." This is about as definite, and limited a provision as could be inserted in an act which could be of general use in its application to all kinds of cases likely to arise. The order in this case was limited to producing such books and papers as contained accounts or entries relating to dealings with the parties being investigated, and especially those containing certain entries specified therein, giving dates and items; to be produced and used "as may be legally admissible as evidence before said grand jury relative to the matter of complaint pending, and then to be investigated by said grand jury," against the persons named.

The act leaves it for the tribunal to determine what books and papers are needed and may be called for, in the order to be issued, and to describe them as far as practicable. The order in this case is not subject to the criticism made by the court in *Carson v. Hawley*, 82 Minn. 204, that it is so general that it does not indicate any knowledge on the part of the person demanding documentary evidence, of any book or paper desired. The order indicates that the grand jury had knowledge of the dates and of many items they wished to verify by the books and papers, and these were plainly stated in the order. It required no undue and improper inquisition into the affairs of the company. By comparison with the items and dates given in the order, the books could easily have been found. The court in its findings of fact says: "It is conceded by the defendant company that before and on the 22nd of August last it had in its possession and subject to its control the papers that it was subsequently notified to produce before the grand jury." So it required no search on the part of the company to find them, and its officials or employees knew they had them at that time. It was no hardship, or detriment to their business to require them to be produced. According to the statements made in behalf

of the company before the court, they were not needed in carrying on business, for it was asserted by the witness they had been destroyed. The order was certainly not an unreasonable search or seizure, but a requirement under this statute, reasonably made, for the production of certain specified books and papers, to be used, so far as admissible, before the grand jury; the order to be served by the delivery of a copy.

No objection was made before the grand jury or the court, on account of indefiniteness of description. The witness who testified in behalf of the company, knew just what was required, and the concession above quoted was made. If indefiniteness was really an objection, the witness might have stated the difficulty he encountered, in understanding the order, and complying with its terms. If he was the person delegated by the company to appear and respond to the order, it was his duty to appear and produce the books and papers, or give a reasonable and truthful excuse for their non-production, and then if he desired, or was so advised, could raise any objection to their use in evidence. *Doe v. Kelley*, 4 Dowl. Pr. 273; *Amey v. Long*, 9 East 473; Wig. on Ev. §2200, at page 2979.

The proceedings in this case under the statute, were in effect the same as under a *subpoena duces tecum*, which is an ancient writ,—Starkie Ev. 86, note—with this difference, that this statute authorizes the service of the order for the production of books and papers upon the corporation itself, while a *subpoena duces tecum* without the statute would be served upon some officer or employee commanding him to appear and bring with him the documents. The object sought is the same in both cases, the production of evidence, to be used, so far as admissible, before the court. When service was made, it was the duty of the corporation to comply with the order. No force was used or threatened or authorized by the order; no quest was made by the officer. There was no interference with the business, or with the property rights of the corporation. We do not think the eleventh article of our State Constitution was intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, or such a proceeding as is authorized by this statute, and was used in this case, the production in any proceeding in court, of documentary evidence. *Hale v. Henkel*, 201 U. S. 43, 73; *Amey v. Long*, 9 East 473; *Bull v. Loveland*, 10 Pick. 9; *U. S. Express*

Co. v. Henderson, 69 Iowa 40; Green. Ev. 469 a; 1 Chit. Cr. Law, 577.

There might be a case where such an order and process might be so made, and used in such a manner as to contravene the provisions of that article of the Constitution. The order might be so broad and unlimited, in its scope, as to constitute an unlawful inquisition into the private affairs of the person summoned, or authorize such a search and disturbance of business as to entitle him to protection against it. But that is not the case with these proceedings.

2. The respondent further claims that the proceedings were an infringement of the same article of our Constitution because no tender was made to the company to cover its fees and expenses for appearing before the court with the books and documents. The statute of 5 Elizabeth, chapter 9, §12, provided for summoning witnesses to attend court, and that they should be tendered their expenses, and for a fine for non-attendance, as well as damages to the party injured, and ever since that time statutes in many different jurisdictions have contained provisions for tendering fees to witnesses. There is such a statute in this State. V. S. §1252. But the statute of Elizabeth related only to witnesses in civil cases; so does our own; and so far as we know none of the statutes in the different states contain any provision for tendering fees to witnesses summoned in behalf of the state in criminal cases. There is no such statute in this State, and no such practice has ever prevailed here. Under our laws it is the duty of any witness summoned upon a subpoena issued in behalf of the State in a criminal case to appear according to the summons, without a preliminary tender of his fees. Having performed his duty as a witness, he is then entitled to fees, which are allowed by statute, or by order of the court. He has no right to refuse to attend because his fees are not tendered. It was said by the Duke of Argyle in 1742, that the public has a claim to every man's evidence, and Lord Hardwicke, assenting to this statement, added, "it is undoubtedly true that the public has a right to all the assistance of every individual." This general proposition has been repeated many times, in various courts of England and of this country. The duty to appear upon a state subpoena and give testimony is not conditional on pre-payment of fees. Mr. Wigmore says: "That condition was

never imposed upon the prosecution in criminal cases * * * . That burden (upon a witness to appear without tender of fees) is not considered by the law a hardship in criminal cases." Wig. on Ev. §2201; 2 Hawk. P. C. Ch. 46, Sec. 168.

In this State, by order of court, upon a showing by the respondent that he is pecuniarily unable to procure the attendance of his witnesses, the names of his witnesses, limited to the number allowed by the court, may also be inserted in the subpoena in behalf of the State, and in such case the fees are not paid in advance. In many states by statute, fees of witnesses on neither side in criminal cases, need be tendered in advance. No rights of the respondent in this respect under the above named article of our organic law, have been violated. A similar holding was had in *West v. State*, 1 Wis. 209, which case will be more particularly noticed later.

3. It is further contended that the statute and these proceedings are contrary to the provisions of article ten of our Constitution, providing in part * * * "nor can he be compelled to give evidence against himself," because the corporation was ordered to produce the books and papers mentioned, which it now claims would tend to its crimination. When a claim for protection under this provision has been properly raised, the courts of this State, and the Federal courts under the fifth amendment to the Constitution of the United States, which is similar, have always given it fair and careful consideration. Such a claim must be presented to the court by the witness, for it is a personal privilege which belongs to the witness alone, and should be made in good faith and under oath. In determining the question here raised it is necessary to notice more fully the proceedings in the court below. Before the grand jury there was an investigation of charges against certain persons, for a breach of a criminal statute of this State. Under the statute of 1906 an order of that court dated October 10, was issued to the company to produce certain books and papers before the grand jury October 17, to be used so far as admissible in that investigation, which was duly served. October 17 the company produced certain books of account and checks, but not all those required, and produced nothing further in response to the notice. October 19 the grand jury reported to the court what the company had done and what it had failed to do, by way of com-

pliance with the order; on the same day the Attorney General filed in court the petition in this case, asking that the company be dealt with for contempt; and on the same day the court issued notice to the company to appear October 30, to show cause why it should not be so dealt with. The company by its attorneys filed a motion to dismiss the petition, first, because the memoranda and papers called for are not legally material and competent evidence in the investigation being made by the grand jury; secondly, because it is sought by said petition to compel said company to bring into this State, for use before said grand jury, papers and memoranda which may tend to criminate said company and render it liable to criminal prosecution; and thirdly, because said statute and the requirements thereof are in contravention of the fourth, fifth and fourteenth amendments of the Constitution of the United States, and of the tenth and eleventh articles of the Constitution of this State. October 30, the day set for hearing on this petition, one of the attorneys of the company filed his own affidavit, sworn to before a notary public, in substance that the papers and memoranda which the company had failed to produce before the grand jury, would if produced in evidence tend to criminate the company and render it liable to criminal prosecution. On the same day the company also filed an answer to the petition, setting forth that during the period covered by the order it kept and filed at its office in Burlington certain papers and memoranda similar to the papers attached to the petition; that on or about August 20 all of the books and papers of the company kept at Burlington relating to the transactions mentioned were sent to the main office of the company at Boston for examination and verification, and long before the service of the order, said papers or memoranda were destroyed, at Boston; that it was unable to find two of the checks called for, and that aside from said papers, memoranda and checks it had produced everything called for in the notice. To this answer the Attorney General filed a replication, denying its truth and joining issue thereon. On testimony introduced, the court made findings of fact, adjudged the company guilty of contempt, and imposed a fine. The court finds from the testimony that Mr. Brigham, manager of the Burlington plant, was in Boston just before August 21 and had a talk with Mr. Heath, the manager of the company, in regard to the business

of the company in Vermont, in connection with the cattle commissioners, and about the time Brigham was in Boston, one Mantor, an employee of the company in Boston, telephoned the bookkeeper in Burlington to bring all the books and papers to Boston, and he did take them all there. And the court finds, notwithstanding the claim of Mantor that the books and papers were destroyed with the exception of those produced before the grand jury, that they were not destroyed; that Mantor knew that the matter was being looked up in Vermont to some extent, and that he sent for the books and papers to be brought to Boston for the very purpose of taking them out of the jurisdiction of this State, and keeping them where he thought they could not be produced. The finding is, in effect, that the testimony and circumstances show that the story of Mantor of the destruction of the books and papers was false, that they were still in existence, and in the custody and control of the company. Nobody testified they were destroyed except Mantor, and on account of the contradictory statements made by him and the suspicious circumstances, the court says he was absolutely discredited. A suspicious circumstance in the mind of the court was that the bookkeeper of the Burlington plant who took the books and papers to Boston has never returned to Vermont; and gave no testimony before the court, in any form. As the court said in its findings, he was the man of all others who knew, and could testify in regard to these matters. The papers would enable the grand jury to trace the history of every animal sold, and without them this would be impossible, and they would be corroborative evidence as against the persons named, in the investigation.

The court further says that Mantor, the only witness who says he saw the books, testified there was nothing there that would incriminate anybody. He was the only witness produced by the company as to this; no witness testified there was anything in them which was incriminating. The court has not found that there was. The substance of these findings by the court is, that the claim of incriminative testimony was not set up by any witness, and was never asserted and maintained by the company in any way previous to the commencement of the contempt proceeding, and then was made by counsel, but not by any witness; and that the witness who testified in regard to the books was dis-

credited. Was the privilege properly and legally claimed by the company?

The first mention of such a claim was in the motion to dismiss. This was after the failure to produce the books and papers, and after the contempt proceedings had been commenced. The motion to dismiss is signed by counsel for the company. The next mention is in an affidavit of one of the attorneys making the naked statement that the papers were incriminating. It is not stated that the affiant had ever seen the books or papers. He makes no statement as to the contents or upon what facts contained in them he bases his opinion or statement that they would be incriminating. A bare expression of opinion, or legal conclusion, without a statement of the facts upon which it was founded may not have had much weight with the court, even if this was the proper method of asserting the privilege.

There has been some difference in the statement of the law as to the privilege of a witness, and its assertion and enforcement, in the courts of England and of this country, but the rule at the present time is quite uniform. When a witness has been duly summoned it becomes his duty to attend at the time and place named in the subpoena. It seems well settled that if he is required to produce documentary evidence by a *subpoena duces tecum* it is his duty to produce what is called for, if it is in his possession or control. There may be, of course, good reasons why the witness is unable to attend, and should be excused, but there is nothing in this case indicating the existence of any excuse for non-attendance by some person duly authorized by the company. The findings of the court are such that no excuse appears for not producing the documents called for. Whether they would be proper testimony to be used in the case, when produced, is not for the witness to say; their relevancy is for the court to determine, and not for him. Rapalje Law of Wit. §302. "But this right of a mere witness to raise the question of jurisdiction in this manner (by a refusal to testify) has not met with the favor of the judges, and in several jurisdictions is virtually denied; *a fortiori* a witness cannot be permitted to refuse to answer a question on the ground that it is irrelevant. To hold that a witness could decide for himself upon the relevancy of a question, against the opinion of the judge presiding, or the officer taking the deposition, would be subversive of all order in judicial

proceedings." Rapalje on Wit. §303. Also in section 304, "The office of the writ of *subpoena duces tecum* extends only to compel the *bringing into court* by a party or witness of books and papers of which he has control, and an inspection of which is deemed to be essential to the proper determination of the issues presented for trial. The writ has no effect upon the question of the admissibility of books and papers so brought in as evidence in the case." Citing: *Bonesteel v. Lynde*, 8 How. (N. Y.) Pr. 226; *Mott v. Consumer's Ice Co.*, 52 How. (N. Y.) Pr. 244.

"In all cases it is a question for the consideration of the judge at the trial, whether upon the principles of reason and equity, production should be required under a subpoena." *Amey v. Long*, 9 East. 475; *Corson v. Dubois*, 1 Holt N. P. 87.

"The question of relevancy is never one for the witness to concern himself with; nor is the applicability of a privilege to be left to his decision. It is his duty to bring what the court requires; and the court can then, to its own satisfaction, determine by inspection whether the documents produced are irrelevant or privileged. This does not deprive the witness of any rights of privacy since the court's determination is made by its own inspection without submitting the documents to the opponent's view, and unless such a mode of determination were employed, there could be no available means of preventing the constant evasion of duty by witnesses." Wig. on Ev. §2200, citing *Amey v. Long*, 9 East 473. In that case Lord Ellenborough delivered the opinion and therein Park, Marryatt and Bell, the distinguished counsel for the successful side said: "As the obligation of the witness to answer by parol does not depend upon his own judgment, but on that of the court, the same rule must prevail with respect to his production of documentary evidence. The witness is bound, at all events, to bring with him the paper which he has been subpoenaed to produce; and when it is in court, he may then state any legal or reasonable excuse for withholding it, of which the court will judge."

A witness must obey a subpoena and be sworn; then he may claim his privilege. *In re Ekstein*, 148 Pa. St. 509; *U. S. v. Kimball*, 117 Fed. 156.

Many other cases might be cited, bearing on the question of the duty of a witness to obey a subpoena and actually appear, and in case of a *subpoena duces tecum* produce the documentary

evidence called for, but these are sufficient to answer the claim made in the motion to dismiss, that the testimony was not material, and to show beyond question that it is the duty of a witness to respond to a subpoena by appearing, and producing books and papers, leaving all questions which he desires to raise to be settled and determined when he and the evidence demanded are before the court.

The testimonial privilege is purely personal. It can be raised only by the witness himself; whether the testimony is privileged is for the court to decide. Wig. on Ev. §2296, 2270; *Chamberlain v. Wilson*, 12 Vt. 491; *Janvrin v. Scammon*, 29 N. H. 280.

It is upon this question that there has been some difference in expression by different courts. In some cases the statement has been so broad that it seemed to give the witness the right to decide whether he would assert the privilege, and also, whether he would answer the question, thus leaving nothing for the court. But the great tendency of modern cases has been such, that a rule seems now to prevail in this country, which has but few exceptions. Rapalje Law of Wit. §266, says:

"The result of a comparison of the adjudications seems to be that the preliminary question, 'can *any* answer, responsive to the question, subject the witness to a criminal prosecution?' must be decided by the court, and not by the witness. If the court holds the affirmative of that question, then the witness has a right to decide whether the answer he would give to the question would have such an effect;" also, "The court will require to be satisfied that the witness is acting an honest part and that he may incur danger by answering; when satisfied of this, he will allow the privilege."

"Where a party calls his adversary as a witness, he has a right to insist on his going on the stand to be sworn, although the counsel for the witness state to the court that he will not answer the questions that will be put to him, as the answers would tend to incriminate him. If the questions have that tendency, the objection must be taken by the party himself on oath." Rapalje on Contempt, 100; *Boyle v. Wiseman*, 29 Eng. L. & Eq. 473; Powell's Ev. (4th Ed.) 109.

The question may be lawfully put, however its tendency to draw out self incriminating testimony, and the witness must

decide himself whether he will assert his privilege, or waive it and answer the question. 1 Green. Ev. §451; 2 Phil. Ev. 783; Whart. Crim. Ev. §465.

Ch. J. Marshall in the trial of Aaron Burr said: "It is the province of the court to judge whether any direct answer to the questions which may be proposed will furnish evidence against the witness." And in this case he also said in substance that if the witness stated under oath that the answer would tend to criminate him he would not be compelled to answer. Taking all he said together, a fair conclusion would be that the privilege must be asserted under oath by the witness, and if his statements are found to be true the court will not compel him to answer.

In *Reg. v. Garbett*, 2 Car. & K. 474, the court held that if a witness asserts his privilege and there appears to be ground for believing that his answer would criminate him he is not compellable to answer. In another English case the court held that a merely remote possibility of legal peril to a witness from answering a question is not sufficient to entitle him to the privilege of not answering; that to entitle him to this privilege, the court must see from the circumstances of the case and the nature of the evidence which he is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; that the position that the witness is sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received as conclusive, is untenable. But that if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. *Reg. v. Boyce*, 1 Best & Smith 311.

There has been some modification of the statement of the law in the opinion of Ch. J. Marshall in the Burr case, as to the right of the witness to judge for himself whether his answer will expose him to prosecution, in a number of American cases, and it is now held more generally, that it is for the court to decide after claim made, by the witness, of his privilege. *Chamberlain v. Wilson*, 12 Vt. 491.

Chief Justice Shaw, in *Bull v. Loveland*, 10 Pick. 9, said:

"It has been decided, though it was formerly doubted, that a *subpoena duces tecum* is a writ of compulsory obligation, which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it."

"But of such lawful or reasonable excuse the court at *nisi prius* and not the witness is to judge."

In *State v. Thaden*, 43 Minn. 253, Mitchell, J., in delivering the opinion, which contains a very full and clear discussion of the subject, says:

"All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself, is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give." This opinion cites with approval the rule laid down by Cockburn, L., C. J., in *Regina v. Boyce*, before cited. We understand this is practically the rule in this State.

The respondent here was not a party; was not charged with any crime, but was merely asked to perform its duty as a witness. Being summoned and appearing before the grand jury with the documentary evidence would not be a violation of its constitutional rights. The privilege of a witness could then be claimed or not, as seemed advisable; if not claimed it would be waived.

In *State v. Duncan et al.*, 78 Vt. 364, 63 Atl. 225, this Court considered the question of incriminating testimony brought up in a different form. It was upon a demurrer to a plea in abatement to an indictment, alleging that the indictment was found upon testimony of the respondent, criminating himself, which he was compelled to give before the grand jury. It is there said that the privilege is that of the witness and he alone can claim it, and is waived if not seasonably asserted. The plea did not show that the respondent asserted his privilege. The compulsion alleged was held to be a conclusion of the pleader, from the facts, and not justified as stated. In that case the witness appeared and testified before the grand jury, but did not claim his privilege. Here he refused to produce the evidence, and therefore

no question of privilege in regard to it arose before the grand jury or court.

We have called attention to the requirements of the law as shown by the above authorities as to a claim of privilege by a witness, mainly for the purpose of showing the necessity of the claim being made by the witness himself, under oath, and in court, and that the claim having been asserted by the witness must be considered and acted upon by the court. The witness cannot refuse to obey a subpoena, and still claim the privilege that his testimony, if given, would incriminate himself.

Neither can a witness disobey a *subpoena duces tecum* and refuse to produce books and papers called for, and still claim the privilege, that the books and papers if produced, would tend to criminate him. To permit such a course to be taken would be to permit courts of justice to be trifled with, and the course and progress of the law to be obstructed and delayed. The privilege of a witness as to these books and papers was never asserted in any manner allowed or authorized by law. It was not shown or claimed to the court, before the contempt proceedings were commenced, that they would tend to incriminate the corporation, or that the privilege of a witness as to it was claimed. The only excuse made by the witness Mantor was that they had been destroyed, and this was found by the court to be untrue. This being so, the constitutional question does not arise, for the respondent never put itself in a position to raise it.

We do not take the view of the respondent, in argument that the question of privilege was properly raised by the motion to dismiss, and that no such question could have been raised before the grand jury. Such a question of privilege could not be raised by a motion to dismiss the petition. A motion to dismiss is not issuable. It reaches defects only which appear on the face of the pleading to be affected by it. The petition contains no allegation relating to any claim of privilege or relating to any testimony which appears to be incriminating. It sets forth the facts of the order, service, and refusal to produce. The motion to dismiss alleges new matter, the claimed privilege, as the ground for dismissal. - No precedent has been shown for this method of making a claim of privilege. Besides, this was *after* the contempt, if any, had been committed, and was an attempted excuse or palliation for what had taken place. The grand jury is a

part of the court; any such question could have been raised before that body, and reported to the court for its action.

This case differs from *Ballman v. United States*, 200 U. S. 186. In that case the witness in fact appeared at the time he was ordered by the Court to appear, and asserted his privilege within the time allowed him in which to give his testimony. The witness in this case made no claim of privilege, at any time, or in any manner, and the claim as it was finally attempted to be made by counsel was too late, and not properly asserted.

Hale v. Henkel, 201 U. S. 43, contains an interesting opinion as to the rights of corporations, and of their officers when called to testify in regard to the transaction of the corporate business, and the privilege of a witness is asserted on the ground that the testimony might be incriminating. It is true that the questions raised in that case are analogous to those relating to visitatorial powers which may be exercised by the State granting the charter, and bear upon the right of the government to investigate the conduct of corporations, in proceedings for breach of the Federal statute, to protect trade and commerce against unlawful restraint and monopolies. But the discussion is illuminating, as clearly setting forth the duties and obligations of corporations to the public, and the right of the State—and in that case the government—to exact full obedience to all reasonable regulations as to the conduct of their business, and full disclosure of all their transactions, in a proceeding in behalf of the government.

Certainly in a case like this, where no right of visitatorial powers is claimed or attempted, but the action on the part of the State is limited to requiring the production of evidence, for use in state proceedings against other persons, it cannot be held that there has been an undue assertion of authority by the State, over a corporation, which by permission of the State is doing business therein.

In the above case it will be noted that instead of the corporation being merely called as a witness in a proceeding upon a complaint against others, it was itself being investigated and its employee who appeared refused to produce its books and papers. While in the view we take of this case it does not become necessary for us to decide whether a corporation has the same right in any case as an individual, to assert a claim of privilege, as a witness, against producing its books and papers,

in a criminal proceeding in behalf of the State, against other persons, we can say at least that before deciding that such a privilege exists in a case like this, we should insist upon its being shown that the assertion of the privilege was made in strict conformity with the law.

4. We have a statute, regulating the admission of foreign corporations to this State for the purpose of doing business, providing in detail for the necessary steps to be taken before admission. This statute requires a foreign corporation, before doing business here to procure a certificate of registration from the Secretary of State that it has complied with all the requirements of the law to authorize it to do business in this State; stating the business of the corporation and that it is such as may lawfully be carried on by a corporation incorporated under the laws of this State for such or similar business; and to file with the Secretary of State a copy of its charter, state its place of business and stipulate upon whom service of process against it may be made; and other provisions in detail, Act No. 20, of Acts of 1902, thus placing itself respecting the business done here, upon the same basis as domestic corporations, as to being subject to the jurisdiction of the courts, under our laws. It has been claimed in argument, that this corporation having been chartered in the State of Maine, was not subject to the law of this State, to the extent of being compelled to produce books and papers which were not then actually in the State. It is understood from the record before us that this corporation had taken all the steps required by statute, to entitle it to admission to this State, and to the protection of its laws applying to all foreign corporations so admitted. No question is made that the service of the order upon it was not in accordance with our statute, relating to the service of process upon foreign corporations doing business in this State.

Since the respondent was thus doing business in this State, so far as pertained to the business done here and all matters and things connected therewith, it was and is amenable to the laws of the State and in duty bound to obey them the same as if it were a domestic corporation. If, in anticipation of being called as a witness or to produce its books and papers, in some proceeding before the grand jury, upon criminal charges against our own citizens, it saw fit to remove them from this to another State,

it should not be permitted to plead its own act, taken for the very purpose of putting them beyond the jurisdiction, as an excuse for not obeying a subpoena and producing them. As a body corporate it was in fact doing business, in Vermont and Massachusetts. Taking the books into Massachusetts was merely shifting them from one hand to the other. They were as much in control of the corporation as before. That is the essential thing, and not the precise locality where they happened to be when called for. The corporation was within this jurisdiction, and the books and papers within its control. No corporation whether foreign or domestic, can evade its testimonial duty, which rests upon it while it is here doing business, by merely sending to the home office, in another state, documents pertaining to said business which are required as evidence in legal proceedings here, and refuse to produce them when required by authority of law. In contemplation of law they are still in this jurisdiction for such purpose, and in control of the corporation doing business here. They are a part of the business of the corporation which is carried on here. They constitute a record of the transactions of that business and belong here, for all legitimate purposes of evidence, when required by our courts.

The right of control and regulation of foreign corporations coming within the State to do business was fully discussed and maintained in *Cook v. Howland et al*, 74 Vt. 393, 52 Atl. 973. See also *Osborne & Woodbury v. Shawmut Ins. Co.*, 51 Vt. 278. At this time in the history of the progress and development of corporate interests, we should not be inclined to take a backward step as to the rights of the Legislature exercised within proper limits, in the control and regulation of corporations, whether foreign or domestic.

In our opinion neither the statute in question nor the order of the court pursuant thereto requiring the production of the documentary evidence mentioned in the order, violates the provision of the Constitution of this State. No claim based upon the 4th or 5th amendment to the Constitution of the United States is made in this Court, nor could there be successfully, since those amendments are held to have no reference to the states.

5. The claim is also made that the statute is contrary to the fourteenth amendment of the Constitution of the United States, because it arbitrarily discriminates between artificial and

natural persons, denying to the former equal protection of the laws. As before seen, prior to the passage of this act, an individual could by a *subpoena duces tecum* be compelled to do all, by way of producing books, etc., that a corporation can be forced to do, under the provisions of the statute. This statute seems designed for requiring the corporation itself, as the responsible owner, and legal custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers, or other servants, who may, or may not, in fact, have custody or control thereof, at the time notice to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced. This accomplishes in a direct way the same object which might require much delay and difficulty to accomplish, without the statute, by a *subpoena duces tecum* served upon such individuals as might be supposed to have the evidence in their custody. The statute leaves the corporation to select such officer, agent or employee as it may see fit, to produce the evidence in compliance with the order made. It authorizes the laying of no unjust burdens upon corporations, as distinguished from individuals, and is designed only to compel the production of admissible evidence, to be used in court. The classification made by the statute places all corporations, whether domestic or foreign, in one class, leaving individuals, whether acting severally, as copartners, or as associates, in another class. The general difference existing between natural and artificial persons in this respect, without this statute, makes the classification made a proper one, one that removes the prior discrimination between them, and therefore not in violation of the equality clause of the fourteenth amendment.

6. It is also claimed that the statute in question is in conflict with the fourteenth amendment because it authorizes the court to punish for contempt, in case of refusal to produce such evidence when ordered, as in this case, and thus deprive a corporation of its property by way of a fine, without due process of law.

The question of what constitutes due process of law has been so recently and fully discussed in this State, with reference to decisions in Federal and state courts, that further consideration is unnecessary. *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14;

State v. Hodgson, 66 Vt. 134, 28 Atl. 1089; *Bartlett v. Wilson*, 59 Vt. 23, 8 Atl. 321; *Hurtado v. California*, 110 U. S. 516; *Hagar v. Reclamation Dist.* 111 U. S. 701; *Turpin v. Lemon*, 187 U. S. 51.

The respondent's contention in this respect is made upon the ground that it was justified in refusing to produce books and papers which might tend to incriminate it, and that this statute requiring their production is unconstitutional.

This proposition is disposed of by what we have previously said in regard to the necessity for appearance and production of documents by a witness, and claiming the privilege when in court, and that it is not for the witness to decide, as to such documents being privileged, but for the court; and as we hold that the claim of privilege was not made as required by law, but that the order was disobeyed, the respondent on common principles stood as a contemnor before the court. The proceedings against it were in accordance with the ordinary mode prescribed by law in such cases and adapted to the end to be attained; the respondent was fully heard respecting the justice of the judgment sought; and the fine imposed was within the discretion of the court. It cannot be said therefore that by the fine it was deprived of property without due process of law.

7. The further objection is made that the statute is in violation of the 14th Amendment, because it provides no compensation for time, trouble, and expense in producing documents and papers in other states and bringing them to this State,—hence a taking of property without due process of law.

By statute witnesses are allowed for travel in the state, and so much a day for attendance upon court. And in state causes extra compensation may be allowed to witnesses called from without the state when their production has been ordered by a judge of the Supreme Court, or by a judge of the County Court presiding at the trial, to prevent a failure of justice; and such judge may order any necessary evidence at the expense of the state, to prevent a failure of justice, and such compensation shall be fixed by the court before whom the trial is had. V. S. 5396.

In practice this statute has very properly been construed as broad enough to cover such witnesses and evidence required

before a grand jury. Since the Act in question contains no special provision touching the fees of witnesses coming before a court or grand jury in obedience to an order issued thereunder, the pay of such witnesses, like that of all others, is governed by the general provisions of the statute upon that subject. Whether the fees which may thus be allowed are reasonable compensation for the time, trouble, and expense necessarily involved in complying with such order, we need not inquire. That is a matter resting with the legislative branch of government, not with the judicial. Mr. Serjeant Hawkins after speaking of the English statute governing witness fees in civil cases says: "But in criminal proceedings the demands of public justice supersede every consideration of private inconvenience; and witnesses are bound, unconditionally, to attend the trial upon which they may be summoned, and be bound over to give their evidence. To persons of opulence and public spirit this obligation cannot be either hard or injurious; but indigent witnesses grew weary of expensive attendance and frequently bore their own charges to their great hinderance and loss; * * *." 2 Hawk. P. C. ch. 46, sec. 168. In *West v. State*, before cited, in holding that a witness is bound to obey the process of subpoena in criminal prosecutions without payment or tender of fees, the court of last resort in Wisconsin said: "But in no sense can the requisition upon the citizen of his attendance upon the courts to testify as a witness, be considered as the taking of private property for public use, within the meaning of the constitution. The object of that provision in the fundamental law, was to protect the citizen from the grasping demands of government, not to absolve him from any of those various personal duties which every good citizen owes to his country; such as the performance of militia duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests when resisted, and the like. There are very many instances in which the citizen is required to perform personal service, or render aid to his government, without other compensation than that of his participation in the general good, and his enjoyment of the general security and advantages which result from common acquiescence in such obligations on the part of all citizens alike, and which is essential to the existence and safety of society."

Suppose it be assumed that by reason of inadequate fees, a corporation suffers injury, by way of time, trouble, or expense, consequent on a compliance with an order to produce evidentiary documents in its possession and control, yet its rights guaranteed by the federal constitution are not thereby violated, since the injury is incidental to the legitimate exercise of the powers of government in the interests of public justice and for the public good. While it may be true, strictly speaking, that criminal law, a law which deals with offences after they have been committed, does not fall within the domain of the police power, a power which aims to prevent offences, (Freund, Police Power, sec. 86) yet, the law governing incidental injuries, to rights of private property, resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, is by analogy, much in point. In *Chicago, B. & Q. R. Co. v. Drainage Comrs.* 200 U. S. 561, 50 L. Ed. 596, the opinion of the Court being by Mr. Justice Harlan, after a very extended examination of decisions of the Federal Supreme Court, also of the courts of last resort in several of the states, it was held, that "if the injury complained of is only incidental to the legitimate exercise of governmental powers, for the public good, then there is no taking of property for the public use, and a right of compensation, on account of such injury does not attach, under the Constitution." Upon this same question, see also *Village of Carthage v. Frederick*, 122 N. Y. 268.

We hold, therefore, that the statute under consideration is not repugnant to the provisions of the fourteenth amendment in this respect.

It being conceded that the decisive question is as to the jurisdiction of the court, we hold that the court had jurisdiction, and we find no error in the proceedings.

The petition for certiorari and the petition for a writ of error are dismissed with costs, the exceptions are overruled with costs, and judgment that the respondent take nothing by its exceptions, and that execution be done.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF J. G.
STRAIT v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed May 13, 1907.

*United States—Domicile—Contractor's Bonds—Action on Bond
—State and Federal Courts—Jurisdiction—Cause of Action
—Retrospective Statutes—Pleading—Pleas to Jurisdiction—
Construction—Constitutional Law—Obligation of Contracts
—Vested Rights.*

A plea to the jurisdiction must negative every fact from which jurisdiction may be presumed.

The highest degree of certainty is required in a plea to the jurisdiction, and all defects therein may be reached by general demurrer. *Cunningham v. Coldbeck*, 63 Vt. 91, overruled.

A plea to the jurisdiction can derive no help from the writ or declaration, unless referred to in such a way as to become a part of the plea; but this is the extent of the rule. The writ or declaration may always be considered against such plea and in aid of the regularity and sufficiency of the proceeding challenged thereby.

A "cause of action" consists of every fact which, if traversed, it is necessary for the plaintiff to prove in order to sustain his action.

Where only a part of the facts constituting a cause of action accrued in this State, our courts have jurisdiction of the cause of action.

Where a declaration counted upon a bond executed to the United States by a Maryland corporation, doing business in Vermont, conditioned that a certain New York corporation, doing business in Vermont, should perform a contract between that corporation and the United States, and pay all persons furnishing materials for the work provided for by said contract, and alleged that a resident of New York furnished such materials at a place in Vermont and that the contractor had not paid therefor, it showed that the courts of Vermont had jurisdiction.

The United States, as a creditor, has no particular domicile but possesses, in contemplation of law, an ubiquity throughout the Union, and hence is domiciled in any state in whose courts it chooses to sue.

The Act of Congress of August 13, 1894, entitled "An Act for the protection of persons furnishing material and labor for the construction of public works," requires contractors for government work to give bonds to the United States, conditioned both for the performance of the contract and for the prompt payment of all persons supplying labor or materials in the prosecution of the work, and provides that such laborers or materialmen, in case of non-payment, "Shall have a right of action" on such bonds, "and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties." *Held* that, in suits on such bonds in the name of the United States for the use and benefit of laborers or materialmen, the United States is not a mere nominal party, but the real plaintiff.

The amendatory act of Congress, approved February 4, 1905, providing that suits on such bonds shall be brought only in the federal courts, is not retrospective, and hence does not preclude an action in a state court, on a bond given prior to the amendatory act, to enforce rights that accrued before the passage of that act.

The "obligation" of a contract is the law that binds the parties to perform their agreement.

The provisions of said federal act of 1894 entered into and formed a part of all the laborers' and materialmen's contracts contemplated thereby, and made prior to said amendatory act of 1905, as if they were expressly referred to and incorporated in the terms of such contracts.

Congress has express power to enact bankruptcy laws directly impairing the obligation of contracts, and it may pass laws in the execution of other powers expressly given, which incidentally have that effect; but other than this, it has no constitutional power to impair or destroy vested rights.

The repeal of statutes by implication, and the implied destruction of vested rights, are alike unfavored in law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration.

Vested rights are property, the impairment or deprivation of which is prohibited the federal government by the fifth amendment of the Constitution.

A statute should not be construed to act retrospectively, or to affect contracts made prior to its enactment, unless its language is so clear as to admit of no other construction.

DEBT on a contractor's bond given in conformity to the Act of Congress of August 13, 1904. Heard on demurrer to defendant's plea to the jurisdiction at the March Term, 1906, Chittenden County, *Miles, J.*, presiding. Demurrer sustained. Plea adjudged insufficient. The defendant excepted. Cause passed to the Supreme Court before final judgment. The opinion states the material part of the plea.

E. M. Horton for the defendant.

The real plaintiff is the beneficiary, a resident of New York. The United States is a mere nominal party and, therefore, can give no jurisdictional rights. *U. S. v. Sheridan*, 119 Fed. 236; *U. S. v. Henderlonh*, 102 Fed. 2; *U. S. v. Barrett*, 135 Fed. 189.

Jurisdiction of parties is determined by the residence of the real plaintiff. *Brown v. Strobe*, 5 Cranch 303; *McNutt v. Bland*, 2 How. 1; *Waldron v. Skinner*, 101 U. S. 589; *Ward v. Arredondo*, 1 Paine 410.

The amendatory Act of Congress of February 4, 1905, provides that suits on bonds of this kind shall be brought "in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, *and not elsewhere.*" There is no saving clause in this Act, and hence it applies to all claims pending at its passage, and controls the jurisdiction of this suit. *Kille v. Iron Works*, 19 Atl. 547; *Richardson v. Cook*, 37 Vt. 600; *Murray v. Mattison*, 63 Vt. 479.

Powell & Powell for the plaintiff.

WATSON, J. This case is here on demurrer to the plea to the jurisdiction, "that the supposed cause of action, and each and every of them (if any such have accrued to said plaintiff)

accrued * * * out of the jurisdiction of this court, that is to say, in the State of Maryland, in the State of New York, and in the jurisdiction of the United States Courts, and not in this jurisdiction * * *." This plea is dilatory in character and will be considered accordingly. The declaration is not made a part of the plea, hence not before us in that way. It is a well understood principle of pleading that a plea in abatement (and this is analogous to a plea in abatement and governed by the same rules) can derive no help from the writ or declaration, unless referred to in such a way as to make it a part of the plea. But this is the extent of the rule. For other purposes the court may take notice of the writ or declaration, it being the same against which the plea is pleaded. As said by Judge Redfield in *Pearson v. French*, 9 Vt. 349, "No intendment is to be made in favor of a plea in abatement, but every reasonable intendment should be made in favor of the regularity and sufficiency of the proceedings." In *Leonard v. McArthur*, 52 Vt. 439, the plea was denominated "a plea in abatement," but the matters of fact therein alleged were dehors the record, and the only question raised thereby was held to be one of jurisdiction. In discussing the plea (which was held defective) it is said that for any purpose of a judgment of the court upon the matters set forth in the plea, the writ and declaration are not before the court, they not being recited or referred to in the plea. "When they will be so treated is indicated in *Barnet v. Emery*, 43 Vt. 178, in distinction from the cases in which it is held that a plea in abatement will derive no help from them, unless referred to in such a way as to make them part of the plea." Thus showing that what is there said regarding the writ and declaration not being before the court has reference solely to their use in aid of the plea. Moreover, the court there demonstrated the extent of the rule by its application, the writ and declaration not being considered before the court in aid of the plea, but in fact noticed in support of the proceedings: "The jurisdiction," says the court, "so far as subject-matter and parties apparent on the face of the writ and declaration is concerned, is well enough."

As showing the rule to be thus limited, the case of *Slayton v. The Inhabitants of Chester*, 4 Mass. 478, to which reference was made by the court in *Pearson v. French*, is directly in point. There the defendant asked that the writ abate because in service

the copy was not left with the clerk, or with one of the principal inhabitants of the town. In the demurrer to the plea one cause assigned was that it appeared from the return indorsed on the writ that a copy of it was left with one of the principal inhabitants of the town, and that defendants were estopped from denying it. It was objected that the return was no part of the demurrer and that the court could not *ex officio* take notice of it. It was held that the return could be noticed, and the plea was held insufficient.

The declaration is in debt, declaring in two counts on a bond alleged to have been executed and delivered by the defendant, a corporation organized and existing under the laws of the State of Maryland and doing business in this State, to the plaintiff, dated March 24, 1903, whereby the defendant acknowledged itself to be held and firmly bound, jointly and severally with the E. H. Denniston Company, a corporation organized and existing under the laws of the State of New York and doing business in this State, unto the United States of America in the penal sum of fifty thousand dollars, etc. It is alleged in the second count that the bond was subject to the following conditions: "that if the said E. H. Denniston Co. shall well and truly perform all and singular the covenants, conditions, and agreements in a certain contract entered into on the 16th day of March, 1903, between said E. H. Denniston Co. and the United States of America, represented by Capt. T. B. Lamoreaux, constructing quartermaster at Burlington, Vermont, and shall promptly make full payments to all persons supplying it, the said E. H. Denniston Co., labor or materials in the prosecution of the work provided for in said contract, then the said obligation shall be void and of no effect; otherwise to remain in full force and virtue." It is averred that the said E. H. Denniston Co. has not performed its said covenants and agreements but has broken and disregarded the same, for that J. G. Strait and W. R. Strait, of Wolcott in the County of Wayne and State of New York, partners, etc., under the firm name and style of J. G. Strait & Son, "did furnish unto the said E. H. Denniston Co. at Burlington in the County of Chittenden and State of Vermont, divers materials used in the prosecution of the work provided for in said contract entered into on the 16th day of March,

1903, between said E. H. Denniston Co. and the United States of America as aforesaid, by reason of which the said E. H. Denniston Co. owes unto the said J. G. Strait & Son the sum of three thousand dollars," etc.

A "cause of action" consists of every fact which it is necessary for the plaintiff to prove, if traversed, in order to sustain his action. *Read v. Brown*, 22 Q. B. Div. 128; *Hutchinson v. Ainsworth*, 73 Cal. 455; *Bruil v. Northwestern Mut. Relief Ass'n*, 72 Wis. 433. It embraces not only the contract in the case, but the breach of it also. In this case it is something more than the contract entered into by the defendant, it includes the furnishing of the materials by J. G. Strait & Son to E. H. Denniston Co. and the latter's failure to pay for the same. Without these facts being shown no breach of defendant's contract appears and no right of action exists against it. As before seen the second count alleges that the E. H. Denniston Co. was doing business in this State and that these materials were furnished it by J. G. Strait & Son at Burlington. These allegations show a contract made in this State, and one of which our courts have jurisdiction. *Osborne & Woodbury v. Shawmut Ins. Co.*, 51 Vt. 278; *Stramburg v. Heckman*, Busbee's N. C. Rep. 250.

The plea contains no direct and positive denial of the facts thus alleged. An inferential or argumentative denial is not sufficient. *Sumner v. Sumner*, 36 Vt. 105; *Morse v. Nash*, 30 Vt. 76. To meet the requirements of good pleading, the plea must negative every fact from which jurisdiction may be presumed. Martin, Civil Procedure, 209; *Diblee v. Davison*, 25 Ill. 486. The highest degree of certainty is required in pleas of this character, and all defects may be reached by general demurrer. Gould's Pl. ch. III, sec. 57-59, ch. ix, sec. 12; *Leonard v. McArthur*, 52 Vt. 439; *Diblee v. Davison*, above cited; *Landon v. Roberts*, 20 Vt. 286. In *Cunningham v. Caldwell*, 63 Vt. 91, 20 Atl. 974, it was in effect held that pleas to the jurisdiction are not required to have the same technical strictness as pleas in abatement. Clearly such is not the true doctrine of dilatory pleading, and in this regard that case is overruled.

Since part of the cause of action arose at Burlington in this State, the county court in which this action was brought has jurisdiction of the cause of action. In *Ilderton v. Ilderton*,

2 Black. H. 145, in discussing the question of jurisdiction and of laying venue of matters transitory arising in a foreign country, Lord Chief Justice Eyre said: "Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it; but if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action, the cause of which arises here, we have jurisdiction, * * *. In the very infancy of commerce, and in the strictest times, as I collect from a passage in Brooke, Trial, pl. 93, the cognizance of matters arising here, was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it, and in these days we should hardly hesitate to affirm that doctrine." In *Jackson v. Spittall*, L. R. 5 C. P. 542, the contract in question was made in the Isle of Man. The breach took place in Manchester, England. There the question of jurisdiction was controlled by statute, but the proper construction of that statute was in question. In deciding this point the court, seeking aid by considering what the law was at the time the statute passed, quoted with approval the law above given laid down by his Lordship in *Ilderton v. Ilderton*, with the further statement that there was no trace of any objection ever having been maintained on the ground that in a transitory action there was no jurisdiction unless every fact necessary to be proved in order to support the action occurred within the jurisdiction. In *Foot v. Edwards*, 3 Blatchf. 310, the action was brought in the Circuit Court of the United States for Connecticut to recover damages for an injury to the plaintiff's mill property, situate in Massachusetts, by the diversion of the stream of water upon which it stood, the act of defendant causing the diversion having been committed in Connecticut. The case stood on demurrer to the declaration. The court, Ingersoll, J., said that when the action is brought in the Federal Court, it must be tried in the state and district where the cause of action arose. It was held that the wrongful diversion of the water in Connecticut, united with the consequent damage which the

plaintiff's mill in Massachusetts sustained, constituted the cause of action; and that, as a part of it essential to the plaintiff's right of recovery took place in Connecticut, without which there would be no good cause of action, the court had jurisdiction.

The same principle obtains at common law where the cause of action includes two or more material things in several counties. Lord Comyns says: "When an action is founded upon two things in different counties, both material to the maintenance of the action, it may be brought in the one county or the other; as if a servant be retained in one county and depart into another, an action lies in the one or the other." Comyns' Dig. Tit. Action, (N 11). The same doctrine is laid down in *Bulwer's Case*, 7 Co. 1; *Scott v. Brest*, 2 T. R. 238; *The Mayor, etc. of London v. Cole*, 7 T. R. 583; *Gregson v. Heather*, 2 Str. 727; *Barden v. Crocker*, 10 Pick. 383.

As far as the jurisdiction of the cause of action is concerned we might rest the case here. But another element of strength is given by considering the domicile of the plaintiff. It is true this suit was brought for the use and benefit of J. G. Strait & Son, yet the United States was the principal party to the contract on which the action is brought, has an interest in the performance of all its provisions, and has the legal right. Hence in actions like this to enforce the specific obligation of the contractor contained in the bond for the protection of those who have furnished labor or materials in the prosecution of the work specified, the controversy is between the government and the contractor in respect of that matter, and the United States is not merely a nominal party, as argued by the defendant, but the real plaintiff. *United States Fidelity & G. Co. v. United States*, 204 U. S. 349.

Regarding the United States as a debtor it is held that debts due from the government have no locality at the seat of government, and that the administrator of a creditor of the government, duly appointed in the state where he was domiciled at his death, has full authority to receive payment and give a full discharge of the debts due to his intestate, in any place where the government may choose to pay it; and that moneys so received constitute assets under that administration, to be accounted for and distributed in the same manner as other debts due the intestate in the state of his domicile. In the language

of Mr. Justice Story, "The United States, in its sovereign capacity, has no particular place of domicile, but possesses, in contemplation of law, an ubiquity throughout the Union." *Vaughan v. Northup*, 15 Pet. 1, 10 L. ed. 639; *United States v. Cox*, 18 How. 100, 15 L. ed. 299; *Wyman v. United States*, 109 U. S. 654, 27 L. ed. 1068. We think the United States as a creditor has the same ubiquitous character, and that in contemplation of law in the bringing of this suit it was domiciled in the jurisdiction of the court to which the suit was brought.

This case is distinguishable from that of *Sawyer v. North American Life Ins. Co.*, 46 Vt. 697, on which the defendant relies. There both parties to the contract resided out of this State. The contract was not made, nor was it to be performed, in the State. No part of the cause of action on which the suit was brought was within the State. And neither of the parties to the suit was situated or resident here.

The question of jurisdiction of the defendant is not within the plea, hence not considered.

The bond declared upon was given under the provisions of an Act of Congress entitled: "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, the same Act under consideration in *United States v. The United States Fidelity and Guaranty Co.*, 78 Vt. 445, 63 Atl. 581. It was there held that since Congress had not given the Federal Courts exclusive jurisdiction of actions arising by virtue of that Act, the jurisdiction was not so restricted, and such actions could be tried and determined in the state courts. It is claimed, however, that by the amendatory Act, approved February 24, 1905, the exclusive jurisdiction is given to the Circuit Courts of the United States, without any saving clause, and that thereby the jurisdiction of the state court to hear and determine the matters involved in this case is taken away. In construing the latter statute a consideration of the consequences will be had. This is allowable as a principle of construction when the meaning is doubtful. *State v. Franklin Co. Sav. Bk. & Tr. Co.*, 74 Vt. 246, 52 Atl. 1069; *In re Sammon*, 79 Vt. 521, 65 Atl. 577.

The new Act does not deal with practice and procedure only, as did the one under consideration in *Murray v. Mattison*, 63 Vt. 479, 21 Atl. 532, cited by defendant, and the one involved

in *Johnson v. Smith*, 78 Vt. 145, 62 Atl. 9. Under the Act of 1894, any person who had furnished labor or materials in the prosecution of the work provided for in the contract with the United States for which payment had not been made, was authorized at any time, either before or after the completion of the work under that contract, to bring suit on the bond in the name of the United States for his use and prosecute the same to final judgment and execution, and thereby receive full payment of his claim to the extinguishment of the amount due on the bond if necessary, without being subject by provisions of the statute to any priority of claim of the government, and without being obliged to pro-rate the judgment with other creditors. While under the new enactment the creditors must take advantage of its provisions, if at all, in one of two ways: First, as interveners if suit be brought by the United States, in which case their rights are subject to priority of claim of the government, and then if the amount of liability of the surety on the bond is not sufficient to pay in full all such creditors they stand on a basis of proportional distribution among themselves. Secondly, if suit be not brought by the government within six months from the completion and final settlement of the contract with it, then within one year after the performance and final settlement thereof one may be instituted on the bond by a creditor or creditors in the name of the United States, in the Circuit Court of the United States in the district in which said contract was to be performed and executed and not elsewhere, for his or their benefit, and prosecuted to final judgment and execution. Any creditor may file his claim in the suit so brought and be made party thereto within one year from the completion of the work under said contract, and not later. When the suit is by a creditor or creditors, only one action shall be brought, and if the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor, *pro rata* of the amount of recovery.

The provisions of the law of 1894 entered into and formed a part of defendants' contract, as if they were expressly referred to or incorporated in its terms. This is so alike as to those provisions which affect its validity, construction, discharge, and enforcement. *King v. Cochran*, 76 Vt. 141, 56 Atl. 667;

F. R. Patch Mfg. Co. v. Capeless, 79 Vt. 1, 63 Atl. 938; *United States v. Quincy*, 4 Wall. 535, 18 L. ed. 403; *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357.

Thus whether a person who has furnished labor or materials intervenes in an action brought by the government, or institutes proceedings himself, under the amendatory Act, the remedy is less adequate and efficacious than that afforded by the provisions of the former law. In addition thereto, if necessary for such person to prosecute the action he is obliged to await the expiration of a specified time before commencing it and is allowed a period of six months thereafter in which to do so. The former Act contains no provision of this nature. Prior to the new enactment the plaintiff acquired vested rights in defendants' contract and in the means of enforcing it according to the statute which entered into and became a part of it. Clearly if the new Act is retrospective it is an impairment of substantial rights secured by that contract. In *Walker v. Whitehead*, before cited, in discussing the constitutional prohibition upon the states, the court, speaking through Mr. Justice Swayne, said: "Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment. The obligation of a contract 'is the law which binds the parties to perform their agreement.' Any impairment of the obligation of a contract, the degree of impairment is immaterial, is within the prohibition of the Constitution. The states may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the Act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract in this way than to attack its validity in any other manner, * * *. It must be left with the same force and effect, including the substantial means of enforcement which existed when it was made."

That case was brought in the state court of Georgia to recover on a certain promissory note. Subsequent to the giving of the note, a statute, retrospective in character, was passed providing that in suits founded on any debt or contract made before an earlier date named, it should not be lawful for the plaintiff to have a verdict or judgment un-

less it be made to appear that the debt had been regularly given for taxes, and that all legal taxes chargeable by law upon the same had been paid for each year after the making of the debt or contract. It was held to be a clear case of law impairing the obligation of a contract. In *McGahey v. State of Virginia*, 135 U. S. 662, 34 L. ed. 304, the question was whether the Acts of the Legislature of that state, which required the production of the bond in order to establish the genuineness of the coupons, and prohibiting expert testimony to prove the coupons, were or were not repugnant to the Federal Constitution. The Court, by Mr. Justice Bradley, said: "It is well settled by the adjudications of this court, that the obligation of a contract is impaired, in the sense of the Constitution, by any act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious." It was held that the requirement of the production of the bonds for the purpose named was unconstitutional; so also the prohibition of expert testimony to establish the genuineness of the coupons, as it took from the holder of such instruments the only feasible means in his power to establish their validity. See also *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090.

These decisions are controlling that the obligation of the contract in suit was directly impaired by the amendatory Act, if retrospective. But as the express inhibition of the organic law in this respect has reference only to the states, we will consider whether to enact a statute of such character is within the power of Congress.

It has long been established that the government of the United States has no powers which are not expressly or by necessary implication granted to it by the Constitution. *Marbury v. Madison*, 1 Cranch 137, 2 L. ed. 60; *Martin v. Hunter's Lessee*, 1 Wheat. 305, 4 L. ed. 97. Congress has express power to enact bankrupt laws directly impairing the obligation of contracts; and it may pass laws in the execution of other powers expressly given, which incidentally have that effect. *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287; *Mitchell v. Clark*, 110 U. S. 633,

28 L. ed. 279. Other than this it has no constitutional power to impair or destroy vested rights; for its power to enact laws are limited to such as " 'shall be necessary and proper to carry into execution' the powers of the government." Measures adopted by it which are prohibited by the Constitution, and those passed which are not within the proper attributes of legislative power, are alike opposed to the Constitution and void. *Cooley*, Const. Lim. 242-245; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

In *Osborn v. Nicholson*, 13 Wall. 654, 20 L. ed. 689, the plaintiff declared upon a promissory note made to him by the defendants, dated March 26, 1861, and payable on the 26th day of December following. A plea was interposed that the note was given in consideration of the conveyance of a negro slave, with a warrant that he was a slave for life; and that on January, 1863, the negro was liberated by the United States government, etc. The case stood on demurrer to the plea. It was held that since the contract was good when made, it was enforceable, and that vested rights therein were not disturbed by the adoption of the 13th Amendment of the Constitution of the United States prohibiting the existence of slavery within the Federal dominions. Thereon the court, speaking through Mr. Justice Swayne, said: "But without considering at length the several assumptions of the propositions, it is a sufficient answer to say that when the 13th Amendment * * * was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to 'the general principles of law and reason,' and to one of the most vital ends of government. *Calder v. Bull*, 3 Dall. 388. The doctrines of the repeal of statutes, and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against

a construction so fraught with mischiefs." In *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558, the same learned justice, again speaking for the Court, declared the doctrine of the sacredness of vested rights to have its root deep in the common law of England. In *Dash v. Van Kleeck*, 7 Johns. 477, Chief Justice Kent, discussing the principle, shows it to be ancient alike in the common and in the civil law, saying: "It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent Parliament, is not to have a retrospective effect"; and that in the civil law it is laid down "that a lawgiver cannot alter his mind to the prejudice of a vested right." See also *Johnson v. Jones*, 44 Ill. 142; *Hubbard v. Brainard*, 35 Conn. 563; *People v. Morris*, 13 Wend. 325.

Furthermore, vested rights are property, to take away or impair which is prohibited the government by the 5th amendment of the Constitution. *Osborn v. Nicholson*, before cited.

In view of these well settled principles of the organic and of the fundamental law, it seems unreasonable to suppose that Congress did not intend that the amendatory Act should be construed with reference to them, thereby avoiding the unjust consequences which would follow a retrospective operation. Indeed, the rule is that a statute should not be construed to act retrospectively, or to affect contracts made prior to its enactment, unless its language is so clear as to admit of no other construction. The presumption is that it was intended to act prospectively only. *City Ry. Co. v. Citizens' Street R. R. Co.*, 166 U. S. 557, 41 L. ed. 1114; *Southwestern Coal and Improvement Co. v. McBride*, 185 U. S. 499, 46 L. ed. 1010. In the latter case the Court, speaking through Mr. Justice White, said: "While in the absence of a constitutional inhibition, the Legislature may give to some of its Acts a retrospective operation, the intention to do so must be clearly expressed or necessarily implied from what is expressed; and assuming the Legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation." In *City of Montpelier v. Senter*, 72 Vt. 112, 47 Atl. 392, it is said: "Retro-

spective legislation is not favored, * * * being highly injurious, oppressive, and unjust; and nowhere will retrospective effect be given to a statute unless it appears that it was the intent of the Legislature that it should have such effect. When such effect would impair a right or do a wrong, it will not be given; * * *." See also *Hine v. Pomeroy*, 39 Vt. 211; *Sturgis v. Hull*, 48 Vt. 302.

It does not appear from the amendatory Act that it was intended by Congress to have retrospective force, nor is its language such as to admit of no other construction. We therefore hold the Act not retrospective, and that it did not defeat the jurisdiction of the state court in which this suit was pending.

This holding is strongly inferentially supported by *United States Fidelity & G. Co. v. United States*, before cited. That action was originally brought in the Federal Circuit Court upon a similar bond given under the provisions of the same Act of Congress, passed in 1894. The question of original jurisdiction of that court was involved, the amount of damages claimed in the declaration being only five hundred dollars. It was there said that as the Act of 1905 does not refer to cases pending at its passage, the question of jurisdiction depends upon the law as it was when the jurisdiction of the court was invoked in that action.

Judgment affirmed and cause remanded.

MARY L. WATKINS v. GEORGE W. CHILDS.

January Term, 1907.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, POWERS, and
MILES, JJ.

Opinion filed May 15, 1907.

*Boundaries — Establishment — Equity Jurisdiction — Scope of
Remedy — Foundation of Remedy — Necessary Parties —
Pleading — Demurrer — Admissions — Averment on Informa-
tion and Belief.*

There must exist some equity superinduced by the defendant, or a danger of a multiplicity of suits, to warrant an application to a court of chancery to ascertain a confused boundary.

The scope of the equity jurisdiction to ascertain a confused boundary is not limited to ascertaining the boundary in question; but, if the original location of the boundary cannot be determined, the court may require the defendant to make good to the orator, as from a common fund, his proper quantity of land out of the land of which the defendant is possessed.

Hence, in an equity proceeding to ascertain a confused boundary, it is necessary for the orator to show that some of the land, in respect of which the relief is sought, is in the possession of the defendant.

The established foundations of the equity jurisdiction to ascertain confused boundaries, are, fraud or misconduct on the part of the defendant resulting in a confusion of the boundary in question, a relation between the parties which makes it the duty of one of them to preserve and protect the boundary, coupled with such neglect or misconduct on his part as results in the confusion of the boundary, and the necessity of a resort to equity to prevent a multiplicity of suits.

Before a court of equity will exercise its jurisdiction to ascertain a confused boundary, all persons interested, whether their estates are present or future, must be made parties.

Where there is a demurrer to the whole bill in equity, and there is any relief to which the orator is entitled on the case stated, the demurrer fails.

Where, in an equity proceeding to ascertain confused boundaries, two lines were involved and several persons not made parties were interested in land bounded by one of the lines, a demurrer to the whole bill fails where it appears that all persons interested in the lands affected by the other line are made parties.

On a demurrer to a bill in equity there is an essential distinction between an allegation in the bill of information and belief, and an allegation of *fact* on information and belief. In the one case, the demurrer admits only that the orator is so informed and believes. In the other, if the allegation is well pleaded in that form, the admission is that the *fact* is as alleged.

In a suit in equity, any fact material to the orator's case, but which is presumably within the personal knowledge of the defendant and presumably not within the personal knowledge of the orator, is well pleaded in the bill by an averment thereof on information and belief; and, therefore, such fact so pleaded is admitted by a demurrer to the bill.

On a demurrer to a bill in equity to ascertain disputed boundaries, the allegations of the bill examined, and *held* insufficient to establish a necessity for equitable interference.

APPEAL IN CHANCERY. Heard on demurrer to the bill at the August Term, 1905, Grand Isle County, *Tyler, J.*, presiding. Demurrer sustained, and bill adjudged insufficient for want of equity. The defendant appealed. The opinion fully states the case. See 79 Vt. 234.

H. S. Peck for the oratrix.

The bill fully sets forth the facts necessary to warrant an application to a court of chancery for the appointment of a commission to determine the two confused boundaries therein described. Pom. Eq. Jur. §1384; 2 Leading Cases Eq. 4 Am. Ed. 850; *Wake v. Conyers*, 1 Eden 331; *Perry v. Pratt*, 31 Conn. 433; *Wetherby v. Dana*, 36 Cal. 255; *Hill v. Proctor*, 10 W. Va. 77; *Ashurst v. McKenzie*, 92 Ala. 484; *Boyd v.*

Dowie, 65 Barb. 237; *Murphy v. Lincoln*, 63 Vt. 280; *High*, *Injun.* 2nd Ed. 457; *Watson v. Sutherland*, 5 Wall. 79; *Boyce v. Grundy*, 3 Pet. 210; *Gormley v. Clark*, 134 U. S. 338; *Henderson v. Johns*, 13 Colo. 280; *Godfrey v. White*, 60 Mich. 443; *McKinney v. Curtiss*, 60 Mich. 611; *Morse v. Nicholson*, 55 N. J. Eq. 705.

Lee S. Tillotson for the defendant.

Equity has no jurisdiction to determine which of two lines is the true boundary. *King v. Brigham*, 23 Ore. 262, 18 L. R. A. 361.

The oratrix must show that resort to a court of chancery is necessary. *Miller v. Warmington*, 1 Jac. & W. 464; *Metcalf v. Beckwith*, 2 P. Wms. 376; *Nye v. Hawkins*, 65 Tex. 600.

POWERS, J. These parties occupy adjoining farms in the town of Grand Isle. The farm of the oratrix, known as the Hyde-Farm, lies south of the one occupied by the defendant, which is known as the Sampson Farm. A highway runs through the farms in a northerly and southerly direction. The Hyde Farm originally embraced all the territory of lot No. 272, but a small piece of about eight acres out of the northeast corner of the lot now belongs to the defendant, and is occupied by him in connection with the Sampson Farm. This parcel is known as the Childs Lot and was carved out of the Hyde Farm in 1867 by an instrument describing it as follows: "Beginning at the northeast corner of lot No. 272, running westerly on the north line of said lot eighty-five rods to the west side of the highway, then southerly on the west line of the highway equal to $14\frac{1}{2}$ rods due south to a stake, thence easterly parallel with the north line of said lot to the east line of the lot to a stake $14\frac{1}{2}$ rods from the northeast corner of the lot, thence northerly on the east line of the lot to the place of beginning, containing about eight acres."

The north line of lot No. 272 is shown to be a straight line running from the northeast corner through to a monument on the shore of Lake Champlain.

This suit concerns, (1) the location of so much of this lot line as lies west of the highway mentioned; and (2) the location of the south line of the Childs Lot above described.

From 1867 to 1893 (the year the defendant acquired title to the Childs Lot) the two stakes mentioned in the above description remained standing. And while there was no fence on that line, there came to be a well defined line of cultivation extending along the south side of the Childs Lot between the stakes mentioned, caused by the ploughing and tilling of the lands by their respective owners. These stakes and the line of cultivation have constituted the only visible boundary between the Hyde Farm and the Childs Lot from 1867 to their removal or obliteration as hereinafter set forth. Since the defendant bought the Childs Lot, the two stakes have, without the oratrix's knowledge or consent, been removed; and, on information and belief, it is alleged that the defendant removed them. It is further alleged, on information and belief, that the defendant has, during his occupancy of the Childs Lot, ploughed over the true south line of his said lot, without regard to the line of cultivation alluded to, and has thereby obliterated and destroyed "for the most part, if not wholly," said line of cultivation. It is further alleged that a dispute has arisen between the parties over the location of this line dividing the Childs Lot from the oratrix's land, and that the dispute and consequent confusion and uncertainty as to where said line is was caused by the removal of said stakes and the "negligence, misconduct, wilful and unlawful acts of the defendant in removing the monuments of, and otherwise effacing said true dividing line, and in ploughing and otherwise tilling the aforesaid land, and obliterating the line of cultivation," without the oratrix's consent and against her protest, and "while she was otherwise in occupancy and control" of her land.

Since the defendant has lived on the Sampson Farm, he has, unlawfully and without right, it is said, removed the fence which for many years stood on the north line of lot No. 272 dividing the farms on the west side of the highway. And, on information and belief, it is alleged that the defendant has cut a line tree, and destroyed other landmarks and monuments on that line west of the highway; whereby great confusion and obscurity exist as to the true location of that line, which is

now in dispute between the parties. It is also alleged that the defendant has removed the fence which formerly stood on the north line of lot No. 272 east of the highway, and that by so doing many of the old monuments and landmarks which located the original and true lot line on that side of the highway have been removed, obliterated or destroyed, whereby confusion and uncertainty have arisen as to the location of that part of the line.

The defendant has built fences along the two lines concerned in this suit, on locations "arbitrarily" fixed by him as the true ones.

The bill shows that divers persons other than the defendant are interested in the Sampson Farm, as part owners and otherwise, but the defendant's ownership of the Childs Lot is not questioned.

The prayer is for the appointment of a commission to determine the two boundaries hereinbefore referred to. The bill is demurred to for want of equity and for want of proper parties.

The appointment of commissions to ascertain confused boundaries is a very ancient branch of the jurisdiction of the court of chancery. Its origin, however, is involved in much obscurity and remains largely a matter of conjecture. And, whether it originated in the equity of preventing a multiplicity of suits, as asserted by Lord Keeper Henly (afterwards Lord Chancellor and Earl of Northington) in *Wake v. Conyers*, 1 Eden 331, or arose from cases in which the parties consented to a commission as surmised by Lord Chancellor Thurlow in *St. Luke's v. St. Leonard's*, 1 Bro. Ch. 40, or was founded upon two ancient writs found in the Register, as was thought by Sir William Grant, Master of the Rolls, in *Speer v. Cawter*, 2 Mer. 410, or was borrowed from the civil law as suggested in the note to *Wake v. Conyers*, 2 Leading Cas. Eq. 439, it is certain that at a very early time it came to be looked upon with disfavor and was exercised with caution. The Lord Keeper in *Wake v. Conyers*, decided in 1759, expressed much jealousy of the jurisdiction and said that such suits were "very far from deserving encouragement." Lord Chief Baron MacDonald said in *Atkins v. Hatton*, 2 Anstr. 386, that it was a jurisdiction "which courts of equity have always been very cautious of exercising." Lord Thurlow is said in *Godfrey v. Littell*, 2 Russ. & Myl. 630, to have concurred with Lord Northington in manifesting an inclination

to narrow rather than extend the jurisdiction. Nor has there been any disposition manifested on the part of American Chancellors to extend the jurisdiction beyond the limits which came to be pretty clearly defined in England. All now agree that a controversy over the location of a boundary between independent proprietors does not of itself afford sufficient ground for equitable interference. Indeed, a *confusion* of boundaries, alone, does not; there must exist some equity superinduced by the act of the party defendant, or a danger of a multiplicity of suits, to warrant an application to the court of chancery for the appointment of commissioners. *Wake v. Conyers*, *supra*; *Speer v. Crawler*, *supra*; *Marquis of Bute v. Glamorganshire Canal Company*, 1 Ph. 681; *King v. Brigham* (Ore.) 18 L. R. A. 361; *Humboldt County v. Lander County*, (Nev.) 26 L. R. A. 749.

It is to be observed that the scope of this equity is not alone to ascertain the boundary in question according to its true location. It goes farther than that. And, when the original location cannot be found, it will require the defendant to make good to the plaintiff—as from a common fund—his proper quantity of land out of the land of which the defendant is possessed. *Atty. Gen. v. Stephens*, 6 De Gex, M. & G. 111; *Speer v. Crawler*, *supra*; *Ashton v. Lord Exeter*, 6 Ves. Jr. 288; *Leeds v. Strafford*, 4 Ves. Jr. 180,—which affords a potent reason why a court of equity should proceed with caution when asked to exercise this jurisdiction.

In considering what will constitute a sufficient ground to call into exercise this jurisdiction of the court of chancery, some difficulty arises in determining what will constitute an “equity superinduced by act of the party.” But it seems clear from the authorities that the established foundations of the jurisdiction are: (1) fraud or misconduct on the part of the defendant resulting in a confusion of the boundary in question; (2) a relation between the parties which makes it the duty of one of them to preserve and protect the boundary, together with such neglect or misconduct on the part of him on whom the duty rests as results in the confusion of the boundary; (3) the necessity of a resort to equity to prevent a multiplicity of suits.

Accordingly it is held that if the defendant gradually encroaches, as by ploughing or digging too near—*Wake v. Con-*

yers, *supra*; *Marquis of Bute v. Glamorganshire Canal Co., supra*;—or by moving a fence,—*Guice v. Barr*, 130 Ala. 570,—a court of equity will interfere. So when a tenant, whose duty it is to keep separate his landlord's land from his own, permits the boundary between the properties to become confused so that the land of the landlord cannot be distinguished from that of the tenant, equity will take jurisdiction. *Atty. Gen. v. Fullerton*, 2 V. & B. 264.

But before that court will act, even in such cases, all persons interested, whether their estates are present or future, must be made parties. 4 Pom. Eq. §1385, n. 6; *Rayley v. Best*, 1 Russ. & Myl. 659. This requirement precludes the court of chancery from taking action regarding the line dividing the farms on the west side of the highway. For, as we have seen, several persons not here parties are interested in the title to the Sampson Farm. But the demurrer on the ground of lack of parties is not limited to that part of the bill which seeks the establishment of that line; it is to the whole bill; and the rule is that when the demurrer is to the whole bill and there is any relief to which the plaintiff is entitled on the case made, the demurrer fails. Story Eq. Pl. §443. The parties to the controversy on the east side of the highway, however, are complete. So it remains to consider whether the court of chancery can, upon recognized principles, proceed to determine the boundary on that side of the highway,—the boundary between the oratrix's land and the Childs Lot.

Does the bill show fraud or misconduct on the part of the defendant, which has resulted in a confusion of the boundary?

This line was marked originally and down to the time the defendant took title to the Childs Lot (1893) by a stake standing at each end of it. Between these stakes (except in the highway) had been formed a ridge or line of cultivation which marked the boundary, and was recognized by the respective owners as such. This ridge the defendant ploughed and obliterated, and the plaintiff insists that this brings the case within the decisions already alluded to. But as long as the stakes stood no confusion could result from the ploughing or any other source, for the boundary was a straight line drawn from one stake to the other. So the ploughing alone, even if wrongful, confused nothing. The removal of the stakes by the defendant is charged

on information and belief; and the question arises whether or not this allegation of fact, being so pleaded, is admitted by the demurrer; for if it is not, the confusion is not shown to have been caused by the defendant. It is to be borne in mind that the allegation is not merely that the oratrix is informed and believes that the defendant removed the stakes; the oratrix says that she is informed and believes *and therefore avers* that he removed them. Under the first form of averment it is properly held that a demurrer only admits that the complainant is so informed, and that he believes the fact so to be. This is plainly correct, for the information and belief is the only *fact* alleged at all. *Walton v. Westwood*, 73 Ill. 125; *Cameron v. Abbott*, 30 Ala. 416; *Messer v. Storer*, 79 Me. 512, 11 Atl. 275. This is the doctrine laid down in Story Eq. Pl. §§241, 256. But the author goes no further; nor do the cases cited in support of the text. Yet it is held in *Trimble v. Amer. Sug. Ref. Co.*, (N. J.) 48 Atl. 912, that an allegation of fact based on information and belief is not admitted by demurrer; and the case is put solely on the text and cases of Story above referred to,—which by no means warrant the conclusion reached in that case. There is a vast difference between a mere allegation of information and belief, and an allegation of a fact *on* information and belief. The New Jersey court evidently failed to note this distinction in the forms of averment. The Trimble Case has been followed to some extent and it seems to have remained for the Michigan Supreme Court in the recent case of *Bates v. City of Hastings*, 108 N. W. 1005, to correct the error by pointing out this distinction between the two forms of averment. In that case it is said that authorities were cited in argument which assert that a demurrer does not admit a fact charged on information and belief, and that all such authorities are based upon the Trimble Case; which case the Michigan court declines to follow, and holds that facts charged on information and belief are admitted by demurrer. We also decline to follow the Trimble Case, though we are not prepared to adopt the Michigan rule without qualification. We think an allegation of fact based upon information and belief is admitted by demurrer when, and only when, it is an allegation which, according to the established rules of equity pleading, may properly be so charged. If the allegation meets this requirement it is well pleaded; other-

wise, not. The rule is that a demurrer admits only facts well pleaded. *Griffin v. Gibb*, 67 U. S. 519, 17 L. Ed. 353; *Smith v. Allen*, (N. J.) 21 Am. Dec. 33; *Roby v. Cossitt*, 78 Ill. 638; *Pearson v. Tower*, 55 N. H. 36; *Churchill v. Cummings*, 51 Mich. 446; *Matthews' Case*, 1 Maddock 558; Story Eq. Pl. §452; Fletcher Eq. Pl. §199; Mit. & Tyl. Eq. Pl. 306, n. 1.

It is an elementary rule that all facts material to the plaintiff's case must be averred positively and with certainty; but this rule is relaxed in the case of an averment of a fact which is presumably within the personal knowledge of the defendant and presumably not within the personal knowledge of the plaintiff. It is held in *Campbell v. R. R. Co.*, 71 Ill. 611, that an allegation of a fact within the defendant's knowledge, of which discovery is sought, is sufficient though made on information and belief. The fact that discovery is sought cannot control the sufficiency of such an allegation and the rule is the same whether discovery is sought or not,—especially under a chancery rule like ours which requires the defendant to answer as fully, directly and particularly to every material allegation of the bill as if he had been particularly interrogated in respect thereto. Ch. Rule 20. In *Aiken v. Ballard*, Rice Eq. 13, it is held that when a fact essential to the complainant's case is charged to be within the defendant's knowledge only, or must of necessity be so, a precise allegation of the fact is not necessary. The allegation of such a fact is, we think, direct and positive within the rule, though made on information and belief.

In *Mayor of Wilmington v. Addicks*, (Del.) 44 Atl. 781, an allegation in this form, "your orator is informed, believes and charges," etc.—essentially an allegation on information and belief—was held to be admitted by demurrer, but the opinion does not discuss the question. It was alleged in that case that the defendants were, in the matters complained of, pretending to act as the directors of a certain corporation, the legal organization of which was, on information and belief, denied. The facts concerning the organization of the corporation would not naturally be within the knowledge of the orator, but presumably would be within that of the defendant, for they would have access to the corporate records. So we think that case is really in harmony with our views above expressed. Of the same character was the allegation in *Bates v. City of Hastings*, for

it referred to the defendants' intention regarding the sale of certain bonds; a matter of which the plaintiff would be expected to know nothing, but about which the defendants would know everything.

So we hold that the demurrer here admits the fact that the defendant removed the stake marking the line,—a fact presumably within his knowledge since it was his own act. The act was wrongful and done in fraud of the rights of the oratrix, and if it alone, or in connection with the other acts charged resulted in a confusion of the boundary, in this respect a proper case is made out.

But it is necessary for a plaintiff to show that some of his lands in respect of which equitable relief is sought, is in the possession of the defendant. *Atty. Gen. v. Stephens, supra; Godfrey v. Littell, supra*; 4 Pom. Eq. §1385.

The oratrix here wholly fails to meet this requirement. Successive trespasses are alleged, but nothing more; and she asserts that she is in possession of her land except as trespassed upon. The fence alluded to is not alleged to include any of the oratrix's land and for aught that appears may stand on the true line, though the location of it was "arbitrarily" selected by the defendant.

Again, it is plain that the location of a lost stake can be as readily discovered in an action at law as in chancery, *Lewis v. Lewis*, 4 Ore. 177, and it must clearly appear that without the assistance of a court of equity the boundary cannot be established. *Miller v. Warmington*, 1 J. & W. 484. Said Sir Thomas Plumer, Master of the Rolls, in that case: "The bill states that there are no marks and bounds to distinguish one part [of the field] from the other; and though there may be none that are visible and apparent to the eye, yet it does not follow that, by addressing themselves to old people acquainted with the place, or by examining the tenant, they might not separate the two parts. The court would expect this to be clearly established before it would interfere." So when the boundary is so defined on the records that it cannot be affected by the fraudulent conduct of the defendant, equitable relief will be denied. *Pendry v. Wright*, 20 Fla. 828.

It is not necessary to approve what is said in *Miller v. Warmington* relative to a resort to the testimony of witnesses

to show that this bill fails to establish a necessity for equitable interference. It does not appear from the bill that the original corners of lot No. 272, some or all of them, are not standing. It does not appear that all the monuments along the north line of that lot are destroyed. It must be remembered that the ascertainment of either the north line of lot No. 272 or the south line of the Childs Lot will easily determine the location of the other. For with the aid of the description of the Childs Lot hereinbefore recited, it would then become a simple problem in surveying. Both these lines are straight lines, and the establishment of any two points in either of them would fix the location of the whole line and solve all difficulties. For aught that appears enough remain of the ancient monuments and landmarks to enable a competent surveyor to establish the bound in question.

Decree affirmed and cause remanded with directions to the court of chancery to dismiss the bill with costs.

P. B. CLOYES, ET AL. v. MIDDLEBURY ELECTRIC COMPANY, ET AL.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, POWERS, and
MILES, JJ.

Opinion filed May 15, 1907.

Water Courses—Artificial Channel—Obstruction—Riparian Rights—Equity Jurisdiction—Parties—Joinder—Multiplicity of Suits.

Equity has jurisdiction of a suit to restrain the unlawful obstruction of a water course, whereby the lands of riparian owners are flooded, where the injury is necessarily continuous in character and operates

prospectively and indefinitely, or is of such a nature that if continued it will ripen into a right, as in such cases the remedy at law is inadequate.

Nor is it necessary to such jurisdiction that the bill should charge that the conditions resulting from the obstruction are unhealthful, though that alone would be a sufficient ground for equitable interference.

On demurrer to a bill in equity brought by riparian owners to restrain the unlawful obstruction of a stream, where the orators' title to the riparian lands is admitted by the demurrer, it is not necessary that such title should be first established by law; besides, the fact that the orators have not established their right at law is no ground of demurrer.

Where a large number of riparian owners, though each claiming under separate rights, are all, at substantially the same time, similarly injured by a wrongful obstruction of the stream, and the injury to each is such that he can severally resort to a court of equity for protection, they may all properly join in a suit in equity to restrain such obstruction.

Where an artificial channel is substituted for the natural channel of a stream, or created in such circumstances as indicate that it is designed to be permanent, riparian rights may attach to it; and where such change is made by mutual action of the riparian owners, their rights and duties in respect of the artificial channel will be the same as if it were the natural one.

Where a riparian owner makes what is to all appearances a permanent change either in the course of the stream, or within its channel, and holds out to the world the representation that such change is permanent, and other persons acquire rights by changing their position in reliance on that representation, he will be estopped from denying its truth, or claiming that the stream does not flow in its true channel.

The orators are riparian owners, under distinct titles, of lands above a waterfall in a natural stream. In 1804, the orators' respective predecessors in title made a contract with defendants' predecessors, who owned the water power at the falls, whereby the latter agreed to remove certain obstructions that they had put on the falls as a dam, to reduce the falls one foot by the removal of rocks, and to lower their flumes so as never to place any obstruction on the falls, etc., all for the draining of the upper riparian lands. These im-

provements were accordingly made, the upper riparian lands thereby drained were improved, and the stream remained in its altered condition till the defendant electric light company acquired an interest in the falls water power in 1893, when it raised the water two feet by the construction of a dam at the head of the falls, thereby flooding the orators' lands. *Held* that defendants are estopped from altering the fall of the stream in its channel thus artificially improved; and that the orators may properly join in a bill in equity to restrain the obstruction.

The artificial conditions created in the stream as the result of said contract, became the natural conditions, not prescriptively, nor by lapse of time, nor by force of the contract, as such, but by dedication and substitution.

APPEAL IN CHANCERY, Addison County. Heard at Chambers, November 22, 1905, *Watson*, Chancellor. Decree for the orators. The defendants appealed. The opinion fully states the case.

Ira H. LaFleur, and *Stickney, Sargent & Skeels* for the orators.

To unreasonably obstruct a water course is a private nuisance, for which an injunction may be asked in equity. *Kooperman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527; *Heilbron v. Fowler So. Co.*, 75 Cal. 426, 7 Am. St. Rep. 183; *Ulbricht v. Eufala W. Co.*, 86 Ala. 587; *Wheelock v. Noonan*, 108 N. Y. 179, 2 Am. St. Rep. 405.

The orators set forth in their bill good ground for relief in a court of equity, for the injury which they complain of is permanent and continuous in its nature, and amounts to the destruction of the value of each of their lands so long as it is maintained, and if maintained, it will ripen into prescriptive rights. The remedy in equity alone is adequate and adapted to reach the justice of the case. *Lyon v. McLaughlin*, 32 Vt. 423; *Canfield v. Andrews*, 54 Vt. 1; *Waterman v. Buck*, 58 Vt. 519; *Ames v. Dorset Mar. Co.*, 64 Vt. 10; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *Miss. Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. Rep. 546; *Bemis v. Upham*, 13 Pick. 169; *Rothery v. N. Y. Rubber Co.*, 90 N. Y. 32.

The instances are numerous in which courts of equity have taken jurisdiction in such cases, avowedly on the ground of preventing a multiplicity of suits, and have given complete relief to all the injured proprietors by a single decree. 1 Poll. Eq. S. 257; *Reid v. Gifford*, Hopk. 416; *Murray v. Hay*, 1 Barb. Ch. 59, 43 Am. Dec. 773; *Cardigan v. Brown*, 120 Mass. 493; *Ballou v. Hopkington*, 4 Gray 324; *Smith v. Smith*, 148 Mass. 1; *Osborne v. Wis. Cen. R. R. Co.*, 43 Fed. 824; *DeForrest v. Thompson*, 40 Fed. 375; *Earl v. DeHart*, 1 Beasley's Ch. (N. J.) 280, 72 Am. Dec. 395.

W. H. Davis and W. H. Bliss for the defendants.

In order to give the court of chancery jurisdiction to grant injunction in a case like this the right must first be established by suit at law. *Prentiss v. Larned*, 11 Vt. 135; *Angell, Water Courses*, §444; *Fair Haven, etc. Co. v. Adams*, 46 Vt. 496; 2 *Farnham, Waters*, 1624, §483; *Sheboygan v. Sheboygan, etc. Co.*, 21 Wis. 667.

The orators are improperly joined, since their claims are several and distinct. *Exeter College v. Rowland*, 6 Madd. 94; *Harrison v. Hogg*, 2 Ves. Jr. 323; *Morris, etc. Co. v. Prudden*, 20 N. J. Eq. 530; *Barham v. Hostetter*, 67 Cal. 272; *Foreman v. Boyle*, 88 Cal. 290; *Stobel v. Kerr Salt Co.*, 164 N. Y. 303; *Palmer v. Waddell*, 22 Kan. 352; *Hudson v. Com.*, 12 Kan. 140; *Stevenson v. Plow Co.*, 14 Kan. 387; *Schultz v. Winter*, 7 Nev. 130; *Grant v. Schmidt*, 22 Minn. 1; *Hellams v. Switzer*, 24 S. C. 29; *Marselis v. Morris Canal etc. Co.*, 1 N. J. Eq. 31.

POWERS, J. We learn from this bill that a natural water course known as Otter Creek flows northerly through Rutland and Addison counties and empties into Lake Champlain at Vergennes. The orators, eighty-eight in number, are the owners in severalty of certain farms and lowlands lying along the stream in the town of Middlebury and other towns south of Middlebury and higher up on the stream. There is a natural falls at Middlebury Village, which has for a great many years furnished power for various industries, and which is now owned and utilized by the defendants. In 1804, the parties then owning the riparian lands above said falls, (a part of which are now

owned by the orators), entered into an arrangement with the parties then owning the power and rights on the falls, pursuant to which they procured the passage of an Act of the Legislature assessing a tax on such riparian lands according to the benefits thereto of the improvements contemplated by said arrangement, appointing assessors to appraise such benefits, a collector to collect such tax, and a committee of five to receive and to expend the money so raised, for the purpose of carrying out the provisions of the contract hereinafter set forth. The assessors proceeded to appraise said benefits, and assessed a tax on said lands sufficient to raise the sum of \$2,000.00, which was collected and paid over to the committee named in the Act. Thereupon, the parties then owning said lands appointed this committee of five as their committee to represent them in the making and execution of a contract with the owners of said power and rights. Pursuant to this arrangement, the committee and the power owners on the tenth day of March, 1806, made, executed in the presence of two witnesses, and caused to be recorded in the office of the town clerk of Middlebury, a contract, which, so far as material here, reads as follows:

“Whereas, the waterworks situated in Middlebury Falls upon Otter Creek, cannot at all times have sufficient supply of water without a dam on said falls; and whereas, it is supposed that such dam on said falls by raising the creek above the falls does a material injury to the lowlands on said creek; and whereas, the owners of lowlands between said falls in Middlebury and Sutherlands’ Falls in Rutland conceive that it would prove highly beneficial to said lands to lower said falls in Middlebury so as to reduce said creek to its natural level; therefore, for the mutual accommodation of the owners of said waterworks and the owners of said lands, it is agreed mutually by and between Gamaliel Painter, Artemas Nixon, Daniel Henshaw, John Warner, and Jonathan M. Young, owners of said water works, and Daniel Chipman, Darius Matthews, Henry Olin, Benejah Douglas and Levi Walker, a committee appointed by said land owners, that the said owners of said works will, during the summer of the year of our Lord, 1806, remove all obstructions which they have put on said falls as a dam to stop the water, between the south-west corner post of said Gamaliel’s mill and Daniel Henshaw’s flume; that they will reduce the falls one

foot on a level below a certain mark made on said falls by Henry Olin and Benejah Douglas; that they will remove certain rocks that project out below the top of said falls towards the south side of said creek, so that the water may fall from the top without obstruction; that they will lower their flumes so as never to place any dam or obstruction on said falls, and that they will at all times permit any of said land owners, or any person by them appointed to remove any obstructions which may accidentally or otherwise be lodged on the rocks at the head of said falls, between the said post at the south-west corner of said Gamaliel Painter's mills, as now erected, and the flume of the said Daniel Henshaw, as they now stand. For which the owners of said lands agree to pay the said mill owners one thousand dollars, one-half of which shall be paid by the first day of July next, and the other half by the first day of October, A. D. 1806; that is to say, the one-half of said one thousand dollars to be paid to Gamaliel Painter, and the other half to be paid to Artemas Nixon, Daniel Henshaw, John Warner and Jonathan M. Young; provided the said work shall then be completed. And it is further agreed that the land owners shall, during the summer of 1806 and 1807, make the stream as convenient for rafting logs from against the north-east corner of Ebenezer Markham's farm, (as it now stands), to the lower side of the bridge, as it would be if the rocks at the head of the falls were not to be reduced. And it is further agreed that the said land owners, at any and all times hereafter have liberty to lower the rocks and rapids in said creek as they shall think proper at any place or places above the lower side of the bridge now erected across said creek near the falls, and that William Goodrich, William Young and Nathaniel Ripley be appointed as a committee to say whether any, and if any, what and how much, shall be done to the channel on each side of the creek to make it as good for rafting logs as if the rocks on the head of said falls were not altered; and if by death or any other accident either or all of said committee be unable to attend said business, the Supreme Court of this State on application of either or both of said parties to this contract, have power to appoint, at any session of said Court in the county of Addison, one or more person or persons to take his or their place or places and execute said charge. And it is further agreed that the said land owners shall indemnify and save harmless the said

mill owners from all damages they may sustain by being sued or prosecuted by any person or persons for lowering said falls."

The water power owners thereupon removed from the falls the obstructions thereon, broke off and removed the projecting rocks, and lowered the falls in accordance with the requirements of this contract. The result was that the aforesaid lowlands were drained and made tillable, and became and are very valuable for agricultural purposes.

After the falls were lowered in this way, they remained as that work left them for a period of more than eighty years, during all which time said lands have been used, cultivated and occupied by their respective owners under a claim of right to have them so remain.

The Middlebury Electric Company, one of the defendants, having purchased an interest in said water power, erected at the head of said falls in 1893 a wooden dam, and thereby raised the water upon said falls about two feet higher than it had been accustomed to flow since the removal of the obstructions as aforesaid; in consequence of which said lowlands were overflowed and rendered valueless for agricultural purposes, and unwholesome effluvia and miasma caused to arise therefrom, rendering the dwellings of the orators unhealthful and unfit for occupancy. The other defendants are the owners of certain interests in said power, and all are now maintaining the dam aforesaid.

The orators have frequently protested to the defendants against the maintenance of the dam and have even attempted to remove it by force, without avail.

The bill alleges that each of the orators suffers a common injury by the alleged wrongful maintenance of the dam, that the cause of complaint is common to all and the same to each, that any defence made will be common to all the orators, and that the testimony, proofs and decrees will be alike as to all the orators except as to the amount of damages.

The prayer is for a decree establishing the orators' right to have the falls continue free from dam or obstructions, as left in 1806, ordering the defendants to remove the present obstruction from the falls, restraining them from erecting or maintaining any such obstructions; for an accounting of damages with each of the orators, and for general relief. The bill is demurred to.

I. That a court of equity has jurisdiction of the subject-matter of this suit cannot well be questioned. The character of the injury caused by the unlawful obstruction of a water course, whereby the lands of riparian owners are flooded, is usually such as to bring the matter within the jurisdiction of that court. To be sure, it must appear in such cases that the remedy at law is inadequate; but such remedy is inadequate, in a legal sense, when the injury suffered by the land owner is necessarily continuous in character and operates prospectively and indefinitely,—*Lyon v. McLaughlin*, 32 Vt. 423,—or is of such a character that if continued would ripen into a right,—*Canfield v. Andrews*, 54 Vt. 1. So, though it is not in every case of this kind that a court of equity will interfere, when the injury is substantial rather than trivial, and permanent rather than temporary, it will readily lend its aid to one whose rights have been so invaded. And that is the case made by this bill, without regard to the allegations showing conditions dangerous to health, which of themselves make a proper cause for equitable interference. 2 Farnh. Wat. §582; *Holsman v. Spring Co.*, 14 N. J. Eq. 335.

Nor, in a case like this, is it necessary that the right should be first established at law. The title to the riparian lands being admitted by the demurrer, the right to have the waters of the stream flow through them free from unlawful obstruction is clear, and the necessity for immediate action urgent. In these circumstances, a court of equity will not hesitate to take jurisdiction. *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Olmstead v. Loomis*, 9 N. Y. 432; *Reid v. Gifford*, Hop. Ch. 416; *Robeson v. Pittenger*, 2 N. J. Eq. 57; *Vaughn v. Law*, 1 Humph. (Tenn.) 123. Besides, it is held that the fact that the complainant has not established his right at law is no ground for a demurrer. *Lockwood Co. v. Lawrence*, *supra*; *Soltau v. De Held*, 2 Sim. (N. S.) 133. This is shown by *Griffith v. Hilliard*, 64 Vt. at p. 646, 25 Atl. 427, where it is held that even in cases where the orator's title is disputed, the court of chancery may proceed and determine which party has the better title. And once equity has taken jurisdiction of a case like this, it will retain it for all purposes and dispose of the whole matter, even to the assessment of damages. *Whipple v. Fairhaven*, 63 Vt. 221, 21 Atl. 533; 6 Pom. Eq. §562; *Roberts v. Vest*, 126 Ala. 355. The fact that the parties are numerous

is not an insurmountable embarrassment. It did not deter the court of chancery from working out the rights of the parties in *Waterman v. Buck*, 58 Vt. 519, 3 Atl. 505.

II. Can the orators join in the bill? If they can, it is solely upon the ground of preventing a multiplicity of suits.

Prof. Pomeroy reduces all possible conditions in which a multiplicity of suits can arise to four classes. His third class is: "Where a number of persons have separate and individual claims and rights of action against the same party, A, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit, brought by all these persons uniting as co-plaintiffs, or one of these persons suing on behalf of the others, or even by one person suing for himself alone." His fourth class is the converse of this: "Where the same party, A, has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as co-defendants." 1 Pom. Eq. §245.

In discussing the cases which properly fall within these classes, he says (§269a) that "under the greatest diversity of circumstances and the greatest variety of claims, arising from unauthorized public acts, invasion of property rights, violations of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of the numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right,' or of 'interest in the subject-matter,' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body." "In a majority of the decided cases," he says, "this community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the in-

dividuals comprising the body arose by means of the same unauthorized, unlawful or illegal act or proceeding." "Even this external feature of unity however," he continues, "has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction, when the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy."

If all this be so, individuals could join in a bill, regardless of whether they could severally resort to equity.

This proposition is vigorously denied in *Tribette v. Railroad Co.*, 70 Miss. 185, 35 Am. St. Rep. 642, wherein it is said that there is no such doctrine in the books, and that Prof. Pomeroy's zeal to maintain a theory has betrayed him into error, and so blinded him as to cause him to confound two distinct things:—joinder of parties and avoidance of a multiplicity of suits. The true doctrine is there said to be, that the mere fact that there is a community of interest in the questions of law and fact presented by a given controversy, or in the kind and form of relief demanded by or against each of several individuals will not warrant equitable interposition, unless the questions involved are of equitable cognizance; that when each of several so situated may proceed or be proceeded against in equity, their joinder as plaintiffs or defendants is not objectionable.

Mr. Freeman, in his note to *Woodward v. Seeley*, 50 Am. Dec. at p. 452, apparently approves the Pomeroy Rule, for he quotes a part of the language above set forth, and says that Prof. Pomeroy discusses this whole subject of the equity jurisdiction to prevent a multiplicity of suits with great learning, clearness and vigor.

It is not necessary to a determination of the question now presented that we should become involved in any controversy over the true scope and extent of the rule under discussion, for here the matters involved are, as we have seen, of equitable cognizance, and the injury complained of is of that character that each of the orators could have resorted to the court of equity for the establishment and protection of his rights. Nor is it necessary that we adopt the rule, even as modified by the Mississippi Court, and approve the statement that the jurisdic-

tion exists when the individual claims arise from entirely separate and distinct transactions; for here we need only go to the extent of holding that in order to warrant the joinder, the wrongful act, being of equitable cognizance, must also be of such a character as to necessarily fall upon all the orators simultaneously, affecting all in the same way, though not necessarily to the same extent. And by "simultaneously" is here meant, not at the very same instant, but at substantially the same time. This proposition is, we feel confident, safely within the authorities and embraces the case made by this bill. Indeed, a more apt illustration of the proper application of the rule could hardly be found.

From the vast number of cases to which this rule has been applied by the courts of this country, the following are selected by way of example:

In *Murray v. Hay*, 1 Barb. Ch. 59, it was held that two persons owning separate tenements, which are injured or rendered uninhabitable by a common nuisance, or which are rendered less valuable by a private nuisance which is a common injury to the tenements of both, may join in a suit to restrain such nuisance. To the same effect are *Madison v. D. S. C. & I. Co.* (Tenn.) 83 S. W. 658, and *Grant v. Schmidt*, 22 Minn. 1.

In *Cadigan v. Brown*, 120 Mass. 493, it was held that several persons owning distinct properties to which there was a common right of way, could join in a suit to prevent the obstruction of such right of way.

In *Parker v. Nightingale*, 6 Allen 341, it was held that the several owners of lots on Hayward Place, holding under titles which provided that no buildings except dwellings should be erected thereon, could join to prevent the defendant from violating the restriction.

In *Rafferty v. Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763, the separate owners of property fronting on High street in the city of Pittsburgh were allowed to join in a bill to restrain the defendant from operating a cable railway on that street.

In *Lonsdale v. Cook*, (R. I.) 44 Atl. 929, it was held that where several persons have a common interest in the prevention of the diversion of the waters of a stream from their respective mill privileges, they may join in a bill to enjoin it, though they hold under distinct titles and claim independent interests.

In *Reid v. Gifford*, Hopk. Ch. 416, the separate riparian and mill owners were allowed to join in a bill to prevent the diversion of the waters of the stream.

In *Strobel v. Salt Co.*, 164 N. Y. 303, 51 L. R. A. 687, it was held that riparian proprietors, each owning distinct parcels of land on a natural water course, have a common grievance which entitles them to join in a suit to prevent the pollution of the stream.

In *Gillespie v. Forrest*, 18 Hun. 110, it was held that all whose lands were overflowed and injured by the erection of piers in a stream could join in a bill against the party erecting them.

In *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, it was held that separate riparian owners could join in a bill to restrain the maintenance of a dam causing their several lands to be overflowed and practically destroyed.

It is true that of these cases, *Murray v. Hay*, *Grant v. Schmidt*, and *Turner v. Hart*, show that an accounting could not be had in such cases in the jurisdictions where those cases arose. But under our practice in equity such accounting can be had as an incident of the general relief granted.

The "community of interest" between the complainants in the foregoing cases, is much like that between the plaintiffs in *Coryton v. Lithebye*, 2 Saund. 115, and the *Tunbridge Well Case*, 2 Wils. 423, in which cases, even in actions at law—where all agree the rule is less liberal—the plaintiffs were held properly joined.

In the former, the plaintiffs owned separate mills, and had acquired by custom the right to have ground at the one mill or the other all the grain of the tenants of the manor of Calliland. The defendant, one of the tenants, withheld his grain from these mills, and procured it to be ground elsewhere. Whereupon the plaintiffs brought an action for damages.

In the latter, the plaintiffs, twelve in number, were dippers at the Tunbridge Wells, chosen by the freeholders of the manor and approved by the lord of the manor. Their business was to attend the Wells and deliver the water to those who resorted there. Their profits arose solely from the voluntary contributions of the visitors. When the defendant, not being properly appointed a dipper, dipped of the waters, the others joined in an action for damages.

The same rule applies to the joinder of defendants; as where several riparian owners, acting independently, discharge mill refuse into a stream to the injury of a lower proprietor. *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. St. Rep. 763. Such a case was *Waterman v. Buck*, *supra*.

And, conversely, it is held that when several plaintiffs have separately sued the same defendant in actions at law for a continuing trespass, and his liability in each action depends upon the same facts, equity has jurisdiction to enjoin the multiplicity of actions and have them consolidated in the same suit. *Railroad Co. v. Garrison*, 81 Miss. 257, 95 Am. St. Rep. 469.

III. The removal of the obstructions to the flow of the stream pursuant to the contract hereinbefore set forth created an artificial condition in the channel, and the rights and liabilities of riparian owners in respect of artificial water courses are not necessarily the same as in the case of natural streams,—though they may be. This depends upon the circumstances under which the artificial condition was created or continued. If an artificial channel is substituted for a natural one, or if it is created under such circumstances as indicate that it is to be permanent, riparian rights may attach to it. *Pollock, C. B. in Wood v. Waud*, 3 Ex. 779; *Railway Co. v. Keys*, 55 Kan. 205, 49 Am. St. Rep. 249. If such change is made by joint or mutual action of the riparian proprietors, the rights and duties with respect to the artificial channel will be the same as though it was the natural one. 3 Farnh. Wat. §827a. This principle might suffice for the disposition of this question, but we are not content to place it there. This change was made by the concurrent action of the parties under a contract mutually agreed to and executed on both sides,—at least so far as it related to the changes in the stream,—but it was all on the lands of the defendants' grantors, and the contract, as such, was not binding on these defendants. Some of the cases hold that after the artificial channel has been maintained for the statutory period, reciprocal prescriptive rights to have it continued arise. *Matthewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349; *Smith v. Youmans*, (Wis.) 37 L. R. A. 285; *Kray v. Muggli*, (Minn.) 54 L. R. A. 473. But the agreement here negatives the adverse character of the right enjoyed by the orators and their grantors, and the technical doctrine of prescription is inapplicable. It is said that there is a much more impregnable ground on which to put such decisions,

and that is the ground of estoppel. And if a land owner makes a change in the course of a stream which to all appearances is permanent, and holds out to the world the representation that such condition is permanent, he will be bound by his acts; and after other persons have acquired rights by changing their positions upon the faith of such representation, he will be estopped from denying that it was true, or claiming that the stream is not flowing in its true channel. 3 Farnh. Wat. §827c. This reasoning is in entire harmony with our own decisions in cases of like character.

In *Woodbury v. Short*, 17 Vt. 387, it was held that when the course of a stream, running through the land of the defendant to that of the plaintiff, was changed by a sudden flood, so as to run upon the defendant's land without passing over that of the plaintiff, and the defendant permitted it to flow in the new channel for a period of ten years, he could not turn it back into the old channel. This decision was put upon the ground of acquiescence, and the court said that if the defendant would restore the stream to its original channel, he must act within a reasonable time and before new interests would naturally be acquired in the new course in which he had permitted it to run.

In *Ford v. Whitlock*, 27 Vt. 265, the same question, except that the change in the stream was made by the owner of the land—a stronger case against its restoration—again came before the court, and the right to restore the stream to its natural channel to the injury of other riparian owners was denied. "It seems to us," says Judge Redfield in the opinion, "analogous to the rules of law which have been applied to dedications to public use, of land or the use of land; and it seems to be highly equitable and just, that where one has by his own act, either originally changed the course of the stream, or suffered it to remain in a channel cut by some sudden convulsion, until others have expended money in erections, as in the present case, in faith of the stream running in the new channel, or, as in the case of *Woodbury v. Short*, may be supposed to have done so, that the stream should not then be allowed to be restored to its former channel to the detriment of other riparian proprietors. * * *

But the law as to running streams is also analogous to public rights like highways and commons, inasmuch as a large number of persons have an interest in fresh water streams, and they are therefore *quasi* of public concern, and the rules of public dedi-

cations have been applied to an acquiescence in a new bed for such stream; and one who cuts such bed on his own land and thereby renders the use of the stream beneficial to other proprietors, in a different mode, is bound to the same extent and in as short a period, as if he alters the fence on a highway or common, and thereby gives privileges to the public. He cannot often recall them after the shortest term. Any term is sufficient, which satisfies the jury that the public were justified in treating it as a dedication."

This is the doctrine of *Delaney v. Boston*, 2 Har. (Del.) 489, wherein it was held that riparian proprietors had a right, by dedication and substitution, to have the waters of a stream flow through an artificial channel which had been cut by a lower owner fifty years before.

It makes no difference that the changes here were made within the channel of the stream, instead of by making a new channel. The rule is precisely the same. 3 Farnh. Wat. §287c. The riparian owners are entitled to the benefit of any such change which may have been made, if they were apparently intended to be permanent, and such owners have acted upon the faith of the conditions so remaining. In *Paige v. Canal & Irrig. Co.*, 83 Cal. 84, it was held, upon the authority of *Woodbury v. Short and Ford v. Whitlock*, that a riparian owner is entitled to the benefit of the removal of obstructions from the head of the stream which had prevented the water from flowing down to his land. *Chapman v. Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401.

It matters very little whether we call it a dedication or an estoppel, for the underlying principle of each is the same—the injustice of allowing one to deny the existence of conditions which by his conduct he has induced another to believe exist, in reliance upon which that other has changed his position.

The artificial conditions created in the Creek at Middlebury became the natural conditions,—not prescriptively, nor by lapse of time, nor by grant contained in the contract, nor by force of the contract, as such, at all; but by force of the circumstances under which they were created,—by dedication and substitution. The contract, (which gained nothing by being recorded, since it was not entitled to record), affords evidence of the intention to make the changes permanent,—a dedication for all time. The right of the then-riparian owners to have the new conditions continue attached at once upon the completion of the work. It

attached to all the riparian lands, and became rooted in them, whether owned by those who were parties to the contract, or not. It now belongs to the orators by virtue of their ownership of riparian lands,—as an incident to such ownership,—whether they derived their titles from those who then owned the lands, or not. It came to them as the fertility of the soil came to them,—not because it was expressly granted, but as a natural appurtenant.

The pro forma decree overruling the demurrer and adjudging the bill sufficient is affirmed with costs to the orators. The decree for the orators according to the prayer of the bill is reversed, pro forma, and the cause is remanded.

WILLIAM G. E. FLANDERS v. BRIDGET E. MULLIN.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed May 18, 1907.

Close Jail Certificate—Bankruptcy—Discharge—Judgment for Wilful Injury.

The right to a close jail certificate does not depend on the finding of a jury, but on a supplemental finding by the court, which may be based on further evidence.

A close jail certificate may be had in all actions founded on tort, regardless of the nature of the allegations.

Under V. S. 1751, the court at the time it renders judgment in an action founded on tort, may adjudge not only that "the cause of action arose from the wilful and malicious act of the defendant," but that it was also "for wilful injuries to the person of the plaintiff."

The malice contemplated by that provision of the Federal Bankruptcy Act excepting from the operation of a discharge judgments in ac-

tions "for wilful and malicious injuries to the person or property of another" is not malice in the broadest sense, ordinarily recognized in passing upon the right to a close jail certificate, but involves some act or neglect due to a wrongful motive.

The provision of the Federal Bankruptcy Act excepting from the operation of a discharge judgments in actions "for wilful injuries to the person or property of another" extends to all actions in which the facts of intent and malice are judicially ascertained, and a close jail certificate may be included in the consideration of the question whether the injuries for which the judgment was recovered were wilful and malicious.

A close jail certificate in an action for injuries sustained while undergoing a surgical operation, that the cause of action "arose from the wilful and malicious act of the defendant, and for wilful injuries to the person of the plaintiff," sufficiently shows that the action was founded on a wilful and malicious injury to the person, so as to bring it within the provision of the Federal Bankruptcy Act, excepting from the operation of a discharge judgments in actions "for wilful and malicious injuries to the person or property of another."

PETITION for a writ of prohibition brought to the Supreme Court for Rutland County at its May Term, 1903, and then heard on petition and answer. Reargued at the May Term, 1905.

At the March Term, 1902, of the Rutland County Court the petitionee obtained judgment, and a close jail certificate, against the petitioner in a suit for injuries sustained by her while undergoing surgical treatment at the hands of the petitioner. On March 7, 1902, the petitioner was duly adjudged a bankrupt on a petition filed by him the day before, and obtained his discharge in bankruptcy in due course on November 29, 1902. On May 2, 1903, this proceeding was brought to prevent a threatened issue of a certified execution against the petitioner upon said judgment.

W. L. Burnap, Henry Ballard and V. A. Bullard for the petitioner.

A judgment rendered pending proceedings in bankruptcy is barred by the judgment debtor's discharge in bankruptcy.

Harrington v. McNaughton, 20 Vt. 293; *Downer v. Rowell*, 26 Vt. 397; *Bank v. Onion*, 16 Vt. 470; 16 Enc., 2nd Ed. 771.

The character of the cause of action as to malice must be determined from the pleadings alone. *In re Patterson*, 1 U. S. 58; *Re Whitehouse*, 1 Lowell, 429; *Warner v. Cronkhite*, 13 N. B. R. 52; *Re Schwarz*, 15 U. S. B. R. 330; *Farmer v. Preston*, 45 Vt. 154; *Re Rhutassell*, 2 Am. B. R. 697; *Re Sullivan*, 2 Am. B. R. 30; *Re McCauley*, 4 Am. B. R. 122; *Burnham v. Pidcock*, 5 Am. B. R. 590; *Hennequin v. Clews*, 111 U. S. 676; *Freche Case*, 6 Am. B. R. 474.

No case can be found holding that an injury resulting from negligence is within the intent of the phrase "wilful and malicious injury." *Crawford v. Burke*, 11 Am. B. R. 15; *Colwell v. Tinker*, 7 Am. B. R. 334; *Re Ruhlin*, 7 Am. B. R. 238.

Butler & Moloney for the petitionee.

"Malice, in common acceptance, means ill will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." *Browage v. Prosser*, 4 Barn. & Cress. 247; *Exlion v. Sargent*, 23 Ohio C. C. R. 180; *Tinker v. Colwell*, 169 N. Y. 531.

The writ of prohibition will not issue to restrain the issuance of an execution by a court having jurisdiction of the case, the issuance of an execution being a mere ministerial and not a judicial act. Am. & Eng. Enc., tit. Prohibition; Enc. of P. & P., tit. Prohibition; High on Extraordinary Legal Remedies, §674.

MUNSON, J. The petitionee obtained a judgment against the petitioner in an action of tort, and an adjudication that the cause of action arose from the wilful and malicious act of the defendant. The petitioner has obtained a discharge in bankruptcy, and contends that the collection of this judgment is barred by it. The bankrupt act excepts from the operation of a discharge judgments in actions "for wilful and malicious injuries to the person or property of another." The suit was for injuries sustained by the plaintiff while undergoing surgical treatment at the hands of the defendant, and was tried on the general issue. The declaration alleges throughout that the acts complained of were done negligently, carelessly, improperly and unskillfully. There is no allegation that they were done inten-

tionally, wilfully or maliciously. The petitioner contends that the question whether the injuries were wilful and malicious is to be determined solely from an inspection of the pleadings; that the charge made and denied is one of negligence merely; that the scope of the judgment is limited to the issue tried; and that the action of the court can add nothing to the judgment as thus determined. But the petitionee claims that the question is to be determined from the record as a whole, and that the findings of the court in granting a close jail certificate determine the wilful and malicious character of the acts complained of in the declaration.

We think the exception in question must be held to cover all cases in which the facts of intent and malice are judicially ascertained by direction of the law, however the act may be characterized by the allegations. The plaintiff's right to a close jail certificate does not depend upon a finding by the jury, but upon a supplemental finding of the court, which may be based upon further evidence. This may be had in all actions founded on tort, regardless of the nature of the allegations. So we proceed to a consideration of the case with the certificate included.

The certificate contains a finding, in the words of the statute, that the cause of action "arose from the wilful and malicious act of the defendant." But the petitioner contends that the malice meant by the Federal law is actual malice, and not malice in the broader sense recognized in passing upon the right to a close jail certificate, and that a mere adjudication of malice in the words of our statute does not bring the case within the exception relied upon. It seems clear that the Federal provision contemplates something more restricted than malice in the broader sense. The term "fiduciary capacity," as used in the same section, is held to include only cases of technical trusts, and not cases of implied trusts. *Hennequin v. Clews*, 111 U. S. 676; 28 Law. Ed. 565; *Stickney v. Parmenter*, 74 Vt. 58, 52 Atl. 73. The word "fraud" also, as used in a previous statute, was held to mean positive fraud, or intentional wrong, and not implied fraud, such as may exist without any bad faith. *Neal v. Scruggs*, 95 U. S. 704, 24 Law. Ed. 586. We have found no satisfactory ground upon which to give a broader meaning to the word as used in the present bankrupt act, although the possibility of this is suggested in *Tinker v. Colwell*, 193 U. S. 473.

If the word "malice" is to receive a similar construction, something more than the ordinary finding of a wilful and malicious act is required. The cases relied upon by the petitionee can not be considered authorities to the contrary. In *Re Freche*, 6 Am. B. R. 479, and *Colwell v. Tinker*, 169 N. Y. 531, 7 Am. B. R. 334, affirmed in *Tinker v. Colwell*, above cited, the debts were judgments recovered in cases of seduction and criminal conversation. The acts there were wrongful in themselves, and afforded a basis for the deduction of malice not found in the charge involved here. A surgical operation is in itself proper, and there must be a finding of something beyond a negligent performance of the operation—a finding of some act or neglect due to a wrongful motive.

But in granting this certificate the court did not confine itself to the words of the statute. Its finding is that the cause of action "arose from the wilful and malicious act of the said defendant, and for wilful injuries to the person of the plaintiff." Our further inquiry is as to the meaning and effect of the second clause.

The clause was apparently intended to add something sufficiently specific to bring the case clearly within the provision of the Federal law. "Wilful" means "intentional"; and the fair meaning of the entire finding is that the wilful and malicious act consisted of intentional injuries to the person of the plaintiff. It cannot fairly be claimed that in thus speaking of wilful, or intentional, injuries, the court referred to the injuries essential to the operation, and if not, it must have referred to injuries wrongfully inflicted beyond the scope of the operation. The petitioner is first found guilty of a wilful and malicious act, and if he intentionally injured his patient in something not essential to the operation, his act therein was wilful and malicious in the required sense.

It is claimed, however, that this part of the finding is not authorized or warranted by the statute, and must be treated as a nullity. The language of the statute covers two classes of cases, only one of which meets the requirement of the bankrupt law. The finding in the words of the statute authorizes a close jail certificate, but is not sufficient to protect the judgment against a discharge in bankruptcy. The additional finding does not go beyond the statute, but indicates the class covered by the statute to which the case belongs. The Federal bankrupt act

is of governing force, and the rights it gives to litigants in our courts are to be recognized and protected. We are not compelled to admit that our courts are powerless to secure to successful suitors a benefit which the bankrupt act intends they shall retain. If the facts justified a finding that would make the certificate effectual under the Federal law, the Court might well incorporate it in its adjudication.

Petition dismissed with costs. Let execution issue.

CHARLES H. ROBINSON v. ST. JOHNSBURY & LAKE CHAMPLAIN
RAILROAD CO.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
POWERS, JJ.

Opinion filed May 18, 1907.

Pleading—Duplicity—Accord and Satisfaction—Release—Operation—Persons Entitled to Benefit—Master and Servant—Assumption of Risk—Carriers—Transportation of Express Messengers—Stipulation Against Liability—Validity.

Where the fact relied upon as the gist of defence is but the consequence of another fact, or when one is necessary to a proper inducement to another, both may be pleaded without making the plea double.

Though the facts alleged in a plea are multifarious, if they all constitute one defence, and require but one answer, there is no duplicity.

Though the facts alleged in a plea disclose two defences, if they are so alleged as to show that only one defence is relied on, the plea is not double.

Where, in an action against a railroad company for personal injuries through negligence, defendant pleaded that plaintiff was a messenger of an express company and received his injuries in the performance of his duties; that defendant and the express company had a contract whereby defendant undertook to carry all express matter and messengers of the express company, the latter assuming all risk of accidents to its messengers, and indemnifying defendant against all claims of such messengers for injuries; and that the express company, for the purpose of settling for and procuring a discharge of plaintiff's cause of action, made a payment to him that was received in full settlement of the cause of action, plaintiff executing a sealed release of his claim,—the pleas are not double, the fact of satisfaction being matter of inducement only.

Where an express messenger entered the employ of an express company with knowledge of a contract between it and a railroad company, whereby the latter was to carry the express company's express matter and messengers and to be indemnified by the express company against all claims for injuries received by its messengers, he must be held to have assented to the contract; but such assent was not a waiver of the messenger's right to assert the liability of the railroad company for injuries resulting to him from its negligence.

The fact that an express messenger on entering the service of an express company had some knowledge of a contract with the railroad company covering his transportation, did not charge him with knowledge of anything in the contract affecting his right of recovery against the railroad company for injuries received through its negligence.

The doctrine that a master must use the care of a prudent man to provide his servant a reasonably safe place in which to work, has no application where, by the terms of the contract, the servant is required to work in a place that is not in the possession and control of the master.

One may be a stranger to a cause of action as disclosed by the pleadings or determined by the inquiry, and not be a stranger to the occurrence out of which the cause of action arose.

Where an express company had a contract with a railroad company whereby the latter was to carry the express company's express matter and messengers, the express company to indemnify the railroad company against claims of messengers for injuries through negligence, the railroad company, in an action by one of such mes-

sengers for injuries, may effectively plead in bar of plaintiff's suit his discharge of the express company for the injuries received.

An express messenger who accepted an employment from an express company, which made it his duty to work upon the trains of a railroad company, assumed, as regards the express company, the risks incident to transportation.

CASE for negligence. Pleas, the general issue, and eight special pleas in bar relying upon a release. Heard on demurrers to said eight special pleas, at the December Term, 1904, Caledonia County, *Tyler, J.*, presiding. Demurrers overruled, *pro forma*, and pleas adjudged sufficient. The plaintiff excepted. Cause passed to the Supreme Court before trial on the merits. The opinion states the case, and the substance of the special pleas.

J. P. Lamson and Dunnnett & Slack for the plaintiff.

A contract stipulating that an employer shall be relieved from the consequences of his own negligence is void. *Brewer v. New York etc. R. R. Co.*, 124 N. Y. 59, 47 Am. & Eng. R. R. Cases, 488.

An express messenger is a passenger for hire. *Voight v. Baltimore etc. Ry. Co.*, 79 Fed. 561; *C. C. & St. L. Ry. Co. v. Ketcham*, 33 N. E. 116.

The defendant having received the plaintiff on its train so that the plaintiff was rightfully there, in the absence of any release or assumption of risk by the plaintiff, the defendant owes him the duty not to negligently injure him. *Dewire v. B. & M. R. R.*, 2 L. R. A. 166; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468.

Harry Blodgett and Young & Young for the defendant.

The contract between the defendant and the express company is a valid contract. *Baltimore etc. Ry. Co. v. Voight*, 176 U. S. 498; *Pittsburg, C. C. etc. Co. v. Mahoney*, 148 Ind. 196. 62 Am. St. Rep. 503; *Long v. Lehigh Valley R. Co.*, 130 Fed. 870; *Louisville etc. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93; *Coup v. Wabash etc. Co.*, 56 Mich. 111, 56 Am. Rep. 374; *Robertson v. Old Colony R. Co.*, 156 Mass. 525; *Bates v. Old Colony R. Co.*,

147 Mass. 255; *Hosmer v. Old Colony R. Co.*, 156 Mass. 506; *Osgood v. C. V. R. Co.*, 77 Vt. 334.

By entering upon the service and riding upon defendant's trains in the baggage car or the express car without himself making a contract with the defendant for his carriage in such car, plaintiff became the representative of the Express Company under the contract between the Express Company and the defendant, and it was his duty to know the terms and conditions of the contract under which the defendant was carrying him. *Long v. Lehigh Valley R. Co.*, 130 Fed. 870; *Blair v. Erie Railway Company*, 66 N. Y. 313; *McDermon v. So. Pac. Co.*, 122 Fed. 669.

The discharge set out in each plea is a full and complete discharge of both this defendant and the Express Company, and therefore is a bar to this action. *Dufur v. Boston & Maine R. R. Co.*, 75 Vt. 165; *Eastman v. Grant*, 34 Vt. 387; *James v. Aiken*, 47 Vt. 23; *Brown v. Marsh*, 7 Vt. 320; *Chamberlain v. Murphy*, 41 Vt. 110; *Tompkins v. Railroad Co.*, 66 Cal. 165; *Sither v. Traction Co.*, 125 Pa. St. 397; *Spurr v. Railroad Co.*, 56 N. J. L. 346; *Livingston v. Bishop*, 1 Johns. 290; *Hale v. Spaulding*, 145 Mass. 482; *Urton v. Price*, 57 Cal. 270; *Jaggard on Torts*, §117; *Addison on Torts*, §1353; *Leddy v. Barney*, 139 Mass. 294; *Brown v. Cambridge*, 3 Allen 474; *Goss v. Ellson*, 136 Mass. 503; *Hubbard v. St. Louis etc. R. Co.*, 173 Mo. 249.

MUNSON, J. The plaintiff sues to recover damages for injuries sustained through the negligence of the defendant while he was riding upon defendant's road. The pleas allege that the plaintiff was a messenger of the American Express Company, and that his injuries were received while he was in the performance of his duties as such messenger; that the two companies had a contract by which the defendant company undertook to transport the express matter and messengers of the express company, and the express company assumed all risk of accidents happening to its messengers, and indemnified the defendant company against all claims made by its messengers for injuries received; and that the express company, for the purpose of settling for and procuring a discharge of the plaintiff's cause of action, made a payment to the plaintiff, which was received in full settlement, satisfaction and discharge of said cause of

action, and that in consideration of said payment the plaintiff executed to the express company a release and discharge of his claim under seal. The pleas are demurred to generally, and specially for that they are double, in that they set forth an accord and satisfaction and a release under seal.

It is true that a release is a complete defence, and that a seal imports a consideration; and if the allegation of the payment and receipt of a certain sum in satisfaction and discharge of the claim is to be treated as the pleading of an accord and satisfaction, the pleas are double. But we think the fact of satisfaction as here presented is matter of inducement only. The pleas allege that the payment was made for the purpose of procuring a discharge and was the consideration of the release given, and conclude with an averment that the causes of action set up in the declaration are the identical causes discharged by the release. The allegations are all confined to a single transaction culminating in the release, and point to the release as the defence relied upon. When the fact relied on as the gist of the defence is but the consequence of another fact, or when one of them is a necessary or a proper inducement to the other, both may be pleaded without making the plea double. Gould Pl. 4th Ed. Ch. viii, §512; *Robinson v. Raley*, 1 Bur. 316. The facts may be multifarious; yet if they all go to make up one entire result, and require but one answer, there is no duplicity. *Torrey v. Field*, 10 Vt. 353 (412). The facts alleged may disclose two defences, but if so alleged as to show that but one is relied upon, the plea will not be double. See *Raymond v. Sturges*, 23 Conn. 146.

The defendant claims in the first place that the contract between it and the express company is a valid contract, and that the plaintiff's relations to it are such that he is bound by it. The plaintiff claims that the case is controlled in this respect by *Sprigg's Admr. v. Rutland R. R. Co.*, 77 Vt. 347, 60 Atl. 143. It was held in that case to be against public policy for a common carrier to stipulate for indemnity against its own negligence in respect of its carriage of a passenger for hire, and that a care-taker accompanying a shipment of cattle under a contract with the railroad company, based upon the same consideration as the contract of shipment, is a passenger for hire. So the determinative inquiry here will be whether the plaintiff was a passenger for hire.

The decision in *Sprigg's Admr. v. Rutland R. R. Co.* is in accord with the holding of the United States Supreme Court in *N. Y. Central R. R. Co. v. Lockwood*, 17 Wall. 357. In *Baltimore & Ohio etc. R. R. Co. v. Voight*, 176 U. S. 498, 44 Law. Ed. 560, that Court, while recognizing and affirming the doctrine of the *Lockwood* case, held that an express messenger, occupying an express car under a contract substantially like the one set up in these pleas, was not a passenger for hire. The plaintiff insists that the reasoning upon which the Court distinguished the *Voight* case from the *Lockwood* case is unsound, and that this Court ought not to adopt it.

The discussion in the *Voight* case is based upon the nature of the business done by express companies and the relations sustained by those companies to the railroad companies giving them transportation, as set forth and judicially recognized in the *Express Cases*, 117 U. S. 1, 29 Law. Ed. 791. It is said that railroad companies and express companies are both common carriers of the public, but that the railroad company does not sustain that relation to the express company; that the right of an express company to the kind of transportation afforded it depends solely upon private contract; that an express messenger receives transportation as an incident of his permanent employment by the express company, and not by virtue of any right which he or his employer is entitled to demand. Any brief summary of the opinion would be inadequate, and the case should be referred to for the full discussion. The same position has been taken by several of the state courts. *Bates v. Old Colony R. R. Co.*, 147 Mass. 255; *Louisville etc. Ry. Co. v. Keefer*, 146 Ind. 21; *Blank Jr. v. Illinois Central R. R. Co.*, 182 Ill. 332.

We are not disposed to reject the theory of the United States Supreme Court as to the relation which the companies sustain to each other; and if we proceed upon that theory the points of difference between the *Sprigg* case and this are manifest, and of controlling significance. If the drover were not the shipper of his own cattle, but one recognized by the law as a common carrier of the cattle of others; if he provided special cars and servants of his own for the transportation and care of the cattle of all persons who desired to ship them, and had an established schedule for the regular and constant service of the cattle-owning public; if the railroad companies had yielded to him all that part of their business as common carriers of freight, and

had undertaken by special contract to draw his cars, giving them the special advantages required by the nature of the business as thus established;—and it were then held that the drover's servant was a passenger for hire, it could be urged with greater force that the holding should control a case like this. It is evident that an express messenger cannot be classed with the caretaker of a private shipper. He receives, holds and delivers express matter in the performance of his employer's duty as a common carrier for the public. His business and his relations to the train service are substantially the same as those of the railroad baggage master. The two are under different employers, and doing a divided work, because in the development of transportation facilities a certain field of service has been divided between two classes of common carriers. We think the distinction made between the *Lockwood* and *Voight* cases stands upon good ground, and that the same distinction should be made between the *Sprigg* case and this. It follows that this case is not within the rule which forbids a railroad company to stipulate against its liability, and that the contract between the two companies is a valid one.

We are next to inquire what bearing this contract has upon the rights of the plaintiff. None of the pleas allege in terms that the plaintiff assented to the contract, and only part of them allege that he had knowledge of it. The plaintiff contends that his rights cannot be affected by an agreement to which he did not assent. But we think the plaintiff must be held to have assented to the contract when he accepted the service with knowledge of its provisions. It is not to be assumed, however, that this knowledge and assent amounted to a waiver of the plaintiff's right to assert the liability of the railroad company. There is nothing in the terms of this contract that imports a waiver of the messenger's right to compensation. In most of the cases involving contracts of this character there was a further agreement on the subject between the messenger and the express company, and the question was whether the messenger could recover notwithstanding this agreement. Here, the question is whether the right of recovery has been cut off by a release, and the plaintiff's knowledge of the contract is important only for its bearing on the effect of the release.

We think the defendant can plead the plaintiff's discharge of the express company in bar of the plaintiff's suit because of

this contract. Under the contract, the ultimate liability for any damage sustained by the plaintiff through the negligence of the defendant rested upon the express company. So payment by the express company, even if that company was in no way liable to the plaintiff, would not be payment by a stranger, but by one who had the right to pay in behalf of the defendant for its own protection. This being the situation, the action of the plaintiff in obtaining satisfaction from and discharging the express company must be held to have been taken in view of the relations subsisting between the two companies, and to have inured to the defendant's benefit. The first, third, fifth and seventh special pleas are held sufficient on this ground.

It remains to consider the pleas which contain no averment of knowledge. It was held in *Brewer v. New York etc. R. R. Co.*, 124 N. Y. 59, 21 Am. St. 647, that an express messenger cannot be deprived of his remedy against the railroad company by an agreement of his employer made without his knowledge or assent. The Indiana court reviewed this case in *Pittsburg etc. Ry. Co. v. Mahoney*, 148 Ind. 196, 62 Am. St. 503, and reached a different conclusion. It was there considered that the express company's rights upon the train were measured by the contract, and that the rights of the messenger could be no greater than those of the company; that the messenger could not avail himself of the right of transportation without accepting the conditions upon which it was granted; that inasmuch as the contract was the basis of his rights it was his duty to inform himself of its terms, and that he was thus charged with knowledge of the provision limiting the railroad company's liability. We are not willing to adopt this view.

It may well be said that the messenger of an express company, who rides without paying fare or having any arrangement of his own, must understand that he is carried under some arrangement between his employer and the railroad company. But it by no means follows that this charges him with the duty of inquiring what that arrangement is. He has no reason to suppose that his personal rights are involved in the doing of his employer's work in the place where his employer has put him. There is nothing connected with his presence upon the train that is inconsistent with the status of one entitled to the benefit of the law of negligence. He is rightfully there, rendering for his employer a service from which the railroad company derives

a benefit, under some contract which might as easily have provided for his transportation by an allowance to the company as by a release from liability for damages. He may well suppose that his transportation is covered by some provision which bears only upon the rights of the contracting parties. He is not called upon to inquire whether his employer, in adjusting its relations with the railroad company, has undertaken to limit his individual rights. So the understanding that there is some arrangement covering his transportation does not charge him with knowledge of anything affecting his right of recovery. It follows that the second, fourth and sixth special pleas are not sustainable on the ground considered. The eighth, although not alleging knowledge, sets up a direct release of the defendant, and is not specially questioned.

We have taken up these questions in the order in which they are presented in defendant's brief, and have passed upon them as presented; although the disposition of other points made by the defendant may render the decision of these unnecessary. The examination of the remaining questions will require a further reference to the pleadings.

The discharge set forth in the first six special pleas is, in substance, that the plaintiff, in consideration of a sum paid him by the American Express Company, released and discharged that company from every cause of action he had against it, and particularly from a claim on account of injuries received in the accident at Greensboro. It is also alleged, in substance, that the plaintiff demanded compensation from the express company for the injuries described in the declaration before such payment was made, and that the cause of action mentioned in said release is the one declared upon. The declaration sets up an undertaking and duty of the defendant to transport the plaintiff in one of its cars, and a negligence in the performance thereof, causing a collision between the car in which the plaintiff was riding and another car of the defendant, whereby the plaintiff was thrown upon the floor of the car and an iron safe cast upon him.

The defendant claims further that the release to the express company discharged both companies because the two were joint tortfeasors. It is argued that it was the duty of the express company to furnish the plaintiff a safe place in which to work, and that as the plaintiff's work was to be done in a moving car this duty included the providing of safe transportation, so that

the express company was chargeable with negligence if there was a shortage of duty in this respect on the part of the defendant. But the safe place doctrine is not applicable when the duty of the employee requires him to work in a place which is not in the possession and control of his employer. *Shannon v. Sanford Co.*, 70 Conn. 573, 66 Am. St. 133. The express company had no control of the tracks or trains of the defendant. In accepting an employment which required him to work on defendant's trains, the plaintiff assumed, as regards his employer, the risks incident to the transportation.

It is claimed in conclusion that if the express company was not liable, or if the express company and the defendant company are not joint tort feorsors, the effect of the discharge will nevertheless be the same. This claim is based upon the theory that satisfaction is a bar, from whatever source it comes.

The rule that a discharge of one discharges all, as applied to cases of joint liability, is of ancient origin and universal recognition. A few instances of its application are found in our own cases. A release to one of several joint debtors or joint trespassers is a release of all. This is upon the ground that there is one demand against all, and that that demand is satisfied. *Brown v. Marsh*, 7 Vt. 320. Full payment by one who is jointly liable with others is a discharge of all; and a release, being an instrument under seal, conclusively imports full payment. *Eastman v. Green*, 34 Vt. 387. One injured by the concurrent negligence of two may recover against either, but can have only one satisfaction. *Dufur v. Boston & Maine R. R.*, 75 Vt. 165 53 Atl. 1068.

In the case last cited, the declaration disclosed a joint liability of the defendant and one Allen, and it was pleaded that plaintiff had given Allen a release of the cause of action. It is said in the opinion: " * * To defeat the action, the defendant must allege facts showing that it was not liable, or that it and Allen were jointly liable, and that the plaintiff released Allen from such liability. If Allen was never liable, then the release given him did not affect the defendant's liability; in that case, the payment by Allen would be the act of a stranger to the cause of action."

This statement in the *Dufur* opinion is entirely consistent with our previous cases, and with the great majority of cases decided elsewhere; for their holding is based on the relations

which those connected with the affair in question sustained to the transaction and to each other; which impliedly excludes the act of a stranger from the scope of the decisions. But the effect of a payment by or release to a stranger has not been directly considered in this State. The statement in the *Dufur* case, although the basis of the argument, was not essential to the decision. So the question presented is an open one; and, as we shall see upon further inquiry, the trend of recent decision invites a careful examination of the authorities.

The inquiry will include cases of contract as well as cases of tort, for it is held that the effect of a release is the same in both. 1 Pars. Con. 28; *Matthews v. Lawrence*, 1 Den. 213; *Turner v. Hitchcock*, 20 Iowa 310, 323. Cases of payment, accord and satisfaction, and release, are all material to the inquiry; for all are cases of satisfaction in different forms. Payment is full satisfaction; an executed accord involves the acceptance of something as satisfaction; and a release is a conclusive acknowledgment of satisfaction. Note 100, Am. St. 391; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Eastman v. Green*, 34 Vt. 387.

It was held in *Grymes v. Blofield*, 5 Cro. Eliz. 541, that a satisfaction of the condition of a bond by a stranger to the obligation was no bar. The authority of this case was questioned by counsel in *Edgecombe v. Rodd*, 5 East 294, but was clearly recognized by the judges, although the decision was mainly put on another ground. The case in Croke was followed by the Supreme Court of New York in *Clow v. Borst*, 6 Johns. 37, decided in 1810, and several cases in that jurisdiction have since been disposed of on the same ground. *Matthews v. Lawrence*, 1 Den. 212, 43 Am. Dec. 665; *Bleakly v. White*, 4 Paige 654; *Daniels v. Hallenbeck*, 19 Wend. 408; *Atlantic Dock Co. v. Mayor*, 53 N. Y. 64. The same view of the matter has been taken in other states. *Stark v. Thompson*, 3 Mon. 296; *Armstrong v. School District*, 28 Mo. App. 169, 180; *Wardell v. McConnell*, 25 Neb. 558; *Missouri etc. Ry. Co. v. McWhorter*, 59 Kan. 345; *Seiber v. Amanson*, 78 Wis. 679; *Thomas v. Central R. R. Co.*, 194 Pa. St. 511. The doctrine has been promulgated in various text books as settled law. It is said in the American note to *Cumber v. Wane*, in 1 Smith's Lead. Cas. 325, 3 Am. Ed., in giving the essentials of a good accord and satisfaction, that one rule, "of no great practical

value, is that the matter received in satisfaction must be given by the debtor, and not by a stranger." It is said in a note to 3 Bl. Com. 16, Shars. Ed., that "the satisfaction should proceed from the party who wishes to avail himself of it; for when it proceeds entirely from a stranger it will be a nullity."

The present standing of the doctrine will be seen from a reference to further cases. In *Jones v. Broadhurst*, 9 C. B. 173, the accuracy of the reports and the subject-matter of the decisions were critically examined, but without passing upon the question. In *Belsham v. Bush*, 11 C. B. 191, a payment made and received for and on account of the defendant, and afterwards ratified by the defendant, was held a bar. In *James v. Isaacs*, 12 C. B. 791, satisfaction from a stranger, without authority or ratification, was held insufficient. These cases were finally reviewed in *Simpson v. Eggington*, 10 Exch. 844, where it was concluded that payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, is not sufficient to discharge a debtor unless it is made by such third person "as agent for and on account of the debtor, and with his prior authority or subsequent ratification." In *Leavitt v. Morrow*, 6 O. St. 71, 67 Am. Dec. 334, the court disregarded the precedents, and held that an accord and satisfaction accepted in discharge of a debt, although coming from a stranger, is available in defence of an action against the debtor. In *Wellington v. Kelley*, 84 N. Y. 547, the court referred to *Grymes v. Blofield*, as a case followed in that jurisdiction and not authoritatively overruled, and said: "We need not now determine whether it should any longer be regarded as authority."

The cases cited by defendant in support of its position are *Tompkins v. Clay Hill St. R. R. Co.*, 66 Cal. 163; *Seither v. Philadelphia Traction Co.*, 125 Pa. St. 397, 11 Am. St. 905; *Hubbard v. St. Louis and Meramec River R. R. Co.*, 173 Mo. 249; *Leddy v. Barney*, 139 Mass. 394. The first two are cases of crossing collisions between the cars of different companies. The third was a case of collision between an express delivery wagon and a street car. In these cases the injury resulted from an impact of forces controlled by two parties, and the situation afforded the basis of an honest claim against either. Neither was a stranger to the occurrence, and it could not be said without an inquiry that either was a stranger to the cause of action. These cases have generally been treated as within the joint tort

feasor doctrine, and the Pennsylvania case seems to have been so treated by the court which decided it; for it was cited in support of the defendant's contention in *Thomas v. Central R. R. Co.*, 194 Pa. St. 511, 45 Atl. 344, and it was nevertheless held that the court properly excluded the release of one not shown to have been liable.

With these cases may be classed *Metz v. Soule*, 40 Iowa 230, where an inmate of the state prison was injured by defective machinery furnished by the contractors entitled to his service, while he was working near it, after protest, under compulsion of an agent of the state; and *Brown v. Cambridge*, 3 Allen 474, where a water works company made and left an excavation in a street which the city was bound to keep in repair. In neither case was the releasee a stranger to the situation that caused the accident. In this connection reference may be had to *Chapin v. Chicago etc. R. R. Co.*, 18 Ill. App. 47, where the injury resulted from a collision between the trains of two roads, and it was considered that the question whether the companies were joint tort feasors was not important, inasmuch as the circumstances were such that an action would have lain against either. See, also, in further presentation of the subject, *Hartigan v. Dickson*, 81 Minn. 284; *Western Tube Co. v. Zang*, 85 Ill. App. 63; *Kentucky etc. Bridge Co. v. Hall*, 125 Ind. 220; *O'Shea v. New York etc. R. R. Co.*, 44 C. C. A. 601.

In *Leddy v. Barney*, 139 Mass. 394, the remaining case cited by the defendant, the parties were fellow employees—the plaintiff as a common laborer and the defendant as superintendent; and the evidence tended to show that the plaintiff was injured in the moving of a derrick by the carelessness of the defendant. The defence was a release taken by the employer. Of the cases cited, this is most like the one at bar, for in both these cases the releasee was, in a sense, involved in the occurrence, but was not connected with the injury. In the *Leddy* case, the releasee employed the defendant as superintendent, but there was no evidence tending to show that he was negligent in selecting the defendant for that position, or that the defendant was in fact incompetent. Here, the express company was the occupant of the car, but if any circumstance in the occurrence as presented permits a supposition that the plaintiff's injuries may have been due in part to the negligence of the express company, there are no allegations to give it that effect. The instructions in the *Leddy*

case made the release a bar if it was found that the payment was made in settlement of the same claim, upon a demand made by the plaintiff, and to avoid a threatened suit; and the verdict for defendant was sustained. In disposing of the case it was said that the effect of releasing a cause of action does not depend upon the validity of the claim, and that the rule that a release to one of several persons liable releases all, applies to a release given to one against whom a claim is made, although he may not be in fact liable.

It is doubtless true that a discharge will not be made ineffective by proof that the party procuring it was not in fact liable. But this is not equivalent to saying that the release of an entire stranger to the transaction will bar a suit against persons who are liable. One may be a stranger to the cause of action as disclosed by the pleadings or determined by the inquiry, and not be a stranger to the occurrence out of which the cause of action arises. A claim against one whose connection with the affair is such that he may be liable, is not the same as a claim against one whom there is no ground for claiming to be liable; and the effect to be given to a payment in the two cases is not necessarily the same.

The defendant also cites the remark of Judge Miller in *Lovejoy v. Murray*, 3 Wall. 1, 18 Law Ed. 129, that "when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." It may also be noted that in *Dufur v. Boston & Maine R. R. Co.*, before cited, it is said that the injured party can have but one satisfaction. The same statement may be found in a great number of cases which were reasoned out and disposed of on the joint tortfeasor doctrine,—the argument and learning of which were entirely superfluous if payment by one who is a stranger in the broader sense is a satisfaction. The explanation seems to be that payment by a stranger has not been considered a satisfaction, but a payment regarding which questions of fraud, duress, voluntary payment, liability of repayment, and equitable relief might arise after suit brought or collection enforced against the one upon whom rested the duty of payment. *Bleakly v. White*, 4 Paige 654; *Stark v. Thompson*, 3 Mon. 296.

Manifestly, the effort of recent decision has been to bring the parties in these anomalous cases into the relations which have always been considered necessary to support a recovery, by finding in their acts certain elements not recognized by the earlier adjudications. The making of a demand is treated as giving the payor the necessary status as far as the claimant is concerned. It is considered that in acceding to the demand the payor puts himself in the position of one who is liable or who assumes to act for one liable. The pleading of the release by one subsequently sued is treated as a seasonable ratification of the settlement. If these views regarding the settlement and the parties are accepted, the satisfaction does not come from a stranger.

The case of *Jackson v. Pennsylvania R. R. Co.*, 66 N. J. L. 319, 49 Atl. 730, a case not cited by defendant, merits special attention. The facts were almost identical with those before us. The plaintiff had acknowledged the receipt from the express company of certain sums in full satisfaction and discharge of all claims for injuries received in a certain accident. There was a contract between the express company and the defendant, not disclosed to the plaintiff, by which the express company agreed to protect the defendant from all claims for damages sustained by its employees. It was considered that the payment was made for and on account of the defendant, that the settlement was recognized and adopted by the plea, and that the plaintiff was bound by the receipt and retention of the money.

Upon the case before us, the payment was made on plaintiff's demand, in settlement of the cause of action, by one who was in fact an indemnitor of the defendant, and whose act the defendant has ratified by pleading it. We hold all the pleas good on this ground. Nothing said in the previous discussion is to be taken as deciding more.

Judgment affirmed and cause remanded.

ALBERT C. COLLINS v. JOSEPH W. FARLEY.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed May 18, 1907.

Justices of the Peace—Default Judgments—Setting Aside by County Court—Requisite Evidence—Petition—Sufficiency, as Affidavit—Pleadings—Construction in Session Proceedings.

In session proceedings, the strict rules of the common law for the construction of pleadings are not applied, but, where it will work neither surprise nor harm, the pleadings are construed liberally, with a view to substantial justice, and ascertaining the real truth of the case.

Under this rule, if a pleading is capable of two meanings, one of which will defeat it, and the other sustain it, this will be taken, and not that.

In order to warrant the county court in granting a petition, brought under V. S. 1667, to set aside a default judgment rendered by a justice of the peace, there must be an affidavit, or some other evidence, of a good defence on the merits of the original action.

A petition to the county court, under V. S. 1667, to set aside a default judgment rendered by a justice of the peace against the petitioner in an action by the petitionee, a constable, to recover what he paid to satisfy a judgment against him by a third person for attaching and selling his property on an execution in favor of the petitioner against another, which alleges that the petitioner "claims, and always claimed, that, prior to the sale of said property by" the petitionee, "he expressly notified" the petitionee "that he would not indemnify him against loss by reason of the sale of said property, but that, if he sold it, he must do so at his own risk," sufficiently alleges that the petitioner gave that notice to the petitionee, and therefore the petition, verified by the oath of the petitionee, is a sufficient affidavit of a good defence upon the merits of the original action.

PETITION, under V. S. 1667, to set aside a default judgment rendered by a justice of the peace. Trial by court at the March Term, 1906, Chittenden County, *Miles, J.*, presiding. Judgment for the petitioner. The petitionee excepted. The opinion states the case. The defendant was constable of the city of Burlington, at the time he made the attachment and sale referred to.

Cowles & Moulton and *C. S. Palmer* for the petitionee.

At common law, a judgment regularly taken is not to be set aside unless it appears that the defendant had a defence upon the merits, and then only for the purpose of allowing defendant to plead the merits. Hence it must appear that there is a good defence upon the merits of the original action. *Tidd's Pr.* *568; *Sellon's Pr.* (1st Am. Ed.) 346; *Sheridan's Pr.* 307; *Paine & Duer's Pr.* (N. Y. Ed. 1830), 621; *Willet v. Atherton*, 1 W. Black. 35; *Stadholme v. Hodgson*, 2 Y. R. 390; *Maddocks v. Holmes*, 1 B. & P. 228; *Read v. Tregeagle*, 7 Mod. 49; *Forbes v. Lord Middleton*, Stra. 1242; *Selby v. Ry. Co.*, 7 E. C. L. & Eq. R. 568; *Lockwood v. Beaumont*, C. T. Hard. 157; *Wood v. Cleveland*, Salk. 518; *Ela v. Goss*, 20 N. H. 52; *Cogswell v. Vanderberg*, 1 Caines Rep. 155; 2 Law Ed. 105 and note; *Bruen v. Merrill*, 3 Caines Rep. 97; *Foster v. Martin*, 20 Tex. 119; *Miller v. Alexander*, 1 N. J. L. 400; *People's Ice Co. v. Schlenker*, 50 Minn. 1; *Pry v. Ry. Co.*, 73 Mo. 123; *Draper v. Bishop*, 4 R. I. 489; *Freeman's Judgments*, (4th Ed.) §498; *Rogan v. Eads*, 101 Ill. App. 509; *White v. Crow*, 110 U. S. 183; *Parrott v. Den.*, 34 Cal. 79; *Black, Judgments*, §347.

A simple affidavit of a defence upon the merits of the original action is not sufficient. *Rich v. Hathaway*, 18 Ill. 548; *Young v. Conklin*, 3 Misc. (N. Y.) 122; *Bailey v. Taaffe*, 29 Cal. 422; *Gauthier v. Russika*, 3 N. Dak. 1.

J. J. Enright and *R. E. Brown* for the petitioner.

The court having found that the petitioner had been deprived of his day in court by mistake, the granting of the petition rested in the discretion of the court and its decision cannot be revised in this court. *Kimbal v. Kelton*, 54 Vt. 177; *Burton v. Barlow*, 55 Vt. 431; *Wilder v. Gilman*, 55 Vt. 503; *Lillie v. Lillie's Est.*, 56 Vt. 714; *Munger v. Verder*, 59 Vt. 386.

ROWELL, C. J. This is a petition to the county court to reverse and set aside the judgment of a justice rendered upon default against the petitioner, as he was unjustly deprived of his day in court by fraud, accident, or mistake, and to hear and determine the action as if it had been brought to said court by appeal.

Said action was brought by the petitionee to recover what he paid to satisfy a judgment recovered against him by one Stiles for attaching and selling his property on a writ and an execution in favor of the petitioner against one Murphy.

The court found the mistake relied upon on trial, and that "the petitioner claimed before it that he had a good and sufficient defence to said action for the reason that he expressly notified said Farley that he would not indemnify him against loss by reason of the sale of said property, and that if he proceeded to sell it he must do so at his own risk." Thereupon the prayer of the petition was granted, and judgment accordingly. The petitionee excepted to the judgment generally, and also specially upon the ground that there was no evidence to support it. The only question the petitionee seeks to raise is, whether the court could grant the petition without an affidavit, or some other evidence, of a good defence upon the merits of the original action, claiming that that was necessary in order to bring the case within the purview of the statute, as it undoubtedly was, as is abundantly shown by the cases cited in the petitionee's brief. On this point the petitionee seeks to question the sufficiency of the petition, both as a pleading and as an affidavit of merits. The petitioner objects that the exceptions do not reach back to the petition in either respect. But we think that the special exception does reach back to it as an affidavit of merits; and we will treat it as reaching back to it as a pleading, without deciding whether it does or not.

It is manifest that the case must stand upon the petition alone for merits, as there was no other evidence before the court tending to show merits. The only allegation of merits that the petition contains is, that "the petitionee claims, and always claimed, that prior to the sale of the property by said Farley, he expressly notified said Farley that he would not indemnify him against loss by reason of the sale of said property, but that if he sold it, he must do it at his own risk."

The petitionee says that this is not an allegation that such notice was given, but only an allegation of a *claim* that it was given, without saying that it *was* given; that a mere *claim* that it was given is not enough, and that the fact claimed cannot be considered, because not being alleged, it is not sworn to.

But in sessions proceedings, the strict rules of the common law for the construction of pleadings are not applied; but on the contrary, the pleadings are construed liberally, with a view to substantial justice, and to getting at the real truth of the case when it will not surprise or harm the other party. Under this rule, if a pleading is capable of two meanings, one of which will defeat it and the other sustain it, this will be taken, and not that. Even at the common law, if the language of a pleading is capable of different meanings, it is permissible to construe it in the sense in which the pleader must be understood to have used it, supposing him to have intended his pleading to be consistent with itself. *Royce v. Maloney*, 58 Vt. 437, 445, 5 Atl. 395.

Now one meaning of the verb *claim* is, to assert; to maintain; to hold or maintain as a fact or as true. Giving this meaning to the word as used in the petition, as we should understand the rule stated, the allegation means that the petitioner asserts as a fact, and maintains as true, that he gave the notice therein claimed. This makes the petition good as a pleading and as an affidavit of defence, and sufficient to bring the case within the purview of the statute and to sustain the judgment, as it is verified by the oath of the petitioner, who has personal knowledge of the fact of notice.

Judgment affirmed.

OLIFF F. HARRISON'S ADMR. v. NORTHWESTERN MUTUAL LIFE
INSURANCE COMPANY.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed May 11, 1907.

*Insurance—Assignment of Life Policy—Validity—Evidence—
Impeachment by Insured's Administrator for Illegality—
Burden of Proof.*

Where a plaintiff, in establishing his case, is not required to disclose an illegal contract to which he is a party, and which his adversary subsequently produces and relies upon in defence, he may, in rebuttal, impeach the transaction for such illegality.

The duty of going forward with argument or evidence may shift frequently from one party to the other in the course of a trial; but the burden of proving an issue constantly rests upon the party who substantially asserts the affirmative thereof.

In an action on a life insurance policy by the administrator of the insured, where the defence was an assignment of the policy by the insured to a certain woman, the plaintiff may impeach the assignment by evidence that its consideration was the agreement of the assignee to continue illicit relations with the insured.

ASSUMPSIT on a policy of life insurance. Plea, the general issue with notice. Trial by jury at the March Term, 1906, Rutland County, *Miles*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. This case has been once before in the Supreme Court, see 78 Vt. 473.

Lawrence & Lawrence for the defendant.

Plaintiff could not impeach the assignment for illegality. The law will not afford relief to either party *in pari causa turpitudinis*. *Monatt v. Parker*, 30 La. Ann. 585; *Platt v. Elias*, 186 N. Y. 79.

A completed voluntary gift, such as this assignment, cannot be impeached by the donor, nor his legal representatives, on account of an immoral or illegal consideration. Wald's Pollock on Contracts, 3rd Ed. 413; *Hill v. Freeman*, 73 Ala. 200; *Antoine v. Smith*, 40 La. Ann. 460; *White v. Hunter*, 23 N. H. 123; *Gisaf v. Neval*, 81 Pa. 354; *Bivins v. Jarnigan*, 59 Tenn. 282; *Fletcher v. Warren*, 70 Gratt. 1.

Butler & Moloney and *F. S. Platt* for the plaintiff.

Defendant, in relying upon the assignment of the policy, has no greater rights than the assignee. *In re Lemerise & Co.*, 73 Vt. 305; *Mound v. Barker*, 71 Vt. 254; *Ellis v. Watkins*, 73 Vt. 371; *Pierce v. Kibbee*, 51 Vt. 562.

ROWELL, C. J. This case has been here before. 78 Vt. 473. It is assumpsit on a policy of insurance issued by the defendant on the life of the intestate, payable to his executors, administrators, or assigns.

The defendant pleaded the general issue, and gave notice therewith according to the statute that it would rely in defence upon an assignment in writing of the policy by the intestate to one Mary Agnes Gleason for a valuable consideration.

The defendant does not question its liability on the policy, but defends for its own protection, as the suit is not brought at the request nor for the benefit of the assignee, but against her will and interest, and for the benefit of the assignor's estate.

The assignment is not under seal, but purports to be "for a valuable consideration," the receipt of which the assignor thereby acknowledges. The defendant introduced the assignment in defence, and rested without offering any evidence of its consideration other than what the assignment itself affords.

The plaintiff, claiming that the assignment was void because of the turpitude of its consideration, offered to show in rebuttal that for some time prior to the taking out of the policy, and for a long time thereafter, and to within a year or six months of the death of the intestate, who was all that time a married man, illicit relations existed between him and the assignee, and that during all that time she was his mistress, and that the assignment to her was made in consideration of her promise and agree-

ment to continue that relation. The defendant objected that the plaintiff could not impeach the assignment by thus debasing the character of the intestate; but the objection was overruled, and the testimony admitted, and the only question made is, whether that was error. We think it was not, for the plaintiff could make out his case, and did make it out, without relying upon or even disclosing the assignment, and therefore he could impeach it by showing the turpitude of its consideration. *Monahan v. Monahan*, 77 Vt. 133, 59 Atl. 169.

But the defendant says that the plaintiff had to rely upon and prove the turpitude of the consideration in order to defeat the assignment, as it contains evidence on its face of a valuable consideration, and therefore made a primary case for the defendant, which cast the burden of proof upon the plaintiff, and so his case, as a whole, does not come within the rule stated. But it is a mistake to suppose that the burden of proof was thus cast upon the plaintiff, for he was under no duty to prove anything on this issue. His sole function was to repel and defeat the defendant's attempt to validate the assignment, which it had set up as a defence, and the burden of establishing which rested upon it throughout, and the question was to be determined upon the whole evidence, and if the plaintiff succeeded in making the scales hang in equal poise only, it was enough for him, for it would defeat the defendant.

In *Stevenson v. Gunning's Est.*, 64 Vt. 601, 25 Atl. 697, it was held that though the plaintiff made out a *prima facie* case by the introduction of a promissory note, signed and delivered by the intestate, and purporting to have been given for value received, yet, although the defendant introduced evidence tending to show want of consideration, the burden was still upon the plaintiff to establish consideration, having weighed in his favor the *prima facie* import of consideration furnished by the note. In *Central Bridge Corporation v. Butler*, 2 Gray 130, the averment that the plaintiff was bound to maintain was, that the defendant was liable to pay tolls. In answer to this, the defendant averred no new fact, such as payment, accord and satisfaction, or release, but introduced evidence to show only no liability. It was held that he did not thereby assume the burden of proof, which still rested upon the plaintiff. So in *Phipps v. Mahon*, 141 Mass. 471, it is held that making a *prima facie* case did not change the burden of proof; that that still rested upon

the plaintiff, though the defendant gave evidence to rebut the plaintiff's proposition as deduced from his evidence. *Hingston v. Kelley*, 18 L. J., N. S., Ex. 360, is precisely to the same effect.

There is much confusion and uncertainty in the cases about the burden of proof. But Prof. Thayer treats the matter clearly, and accurately, we think, when he says that it is always the *actor* and never the true *reus* or defendant who has to bring his proof to the required height, for, strictly speaking, it is only the *actor* that has the duty of proving at all; that whoever has that duty, does not make out a *prima facie* case till he comes up to the requirement as regards quantity of evidence or force of conviction that applies to his contention, and that he has not, of course, accomplished his task at the end of the debate unless he has held his case good and at the legal height against all counter proof; that this duty, in the nature of things, cannot shift, but is always the duty of one party and never of the other. But as the *actor*, if he would win, must begin by making out a case, and must end by keeping it good, so the *reus*, if he would not lose, must bestir himself when his adversary has once made out his case, and must repel it, and then the *actor* may again move and restore his case, and so on; that this shifting of the duty of going forward with argument or evidence may go on during the trial; but that the thing that shifts and changes is not the peculiar duty of each party, for that remains peculiar, but the common and interchangeable duty of going forward with argument or evidence whenever your case requires it. Prelim. Treat. Ev. 369.

Judgment affirmed.

SOPHIA S. HOBART'S ADMR. v. H. D. VAIL.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 18, 1907.

Confidential Relation—Principal and Agent—Transactions Between—Validity—Burden of Proof—Accounting by Agent—Master's Report—Construction—Attorney and Client—Attorney Acting for Both Parties—Gifts—Delivery—Assignments—Operation and Effect—Evidence—Parol Evidence.

Wherever a fiduciary or confidential relation exists between the parties to a deed, gift, contract, or the like, which gives the person confided in an advantage over the other, equity casts upon the former the burden of showing absolute fairness on his part and freedom of the other from undue influence.

In a suit in equity to set aside certain assignments, deeds, and agreements executed by the orator's testatrix to defendant, where it appeared that defendant had the possession and management of the testatrix's whole estate, and was her trusted adviser in all matters, the burden is on him to show that the testatrix was mentally competent, and did what she did without undue influence, and with full knowledge of her property and of the nature and effect of her acts.

The finding of the master that the testatrix was a person of strong mind, in possession of her faculties, and that the transactions in question were fully and particularly explained to her, amounts to a finding that she understood the nature and effect of the transactions.

The findings of the master examined and *held* that they show the testatrix to have had an adequate knowledge of her property.

In the preparation of the papers needed to effect the purpose of the parties to any transaction, an attorney may properly, to their knowledge, act for each, and give to each the advice necessary for his protection.

The proceedings of special masters are presumed to be correct, and the burden is on the excepting party to see that any claimed error affirmatively appears.

As the master has found affirmatively that the testatrix was free from undue influence in respect of the questioned transactions, and there is nothing to show that, in reaching this conclusion, he did not consider the presumption to the contrary arising from the confidential relation existing between defendant and the testatrix, it will be presumed on appeal that he did so consider it.

The master, in reaching the conclusion that "no undue influence was had or exercised" in respect of the questioned transactions, having considered the presumption to the contrary arising from defendant's confidential relation toward the testatrix, that finding negatives not only the direct employment of undue influence, but also the influence naturally arising from the testatrix's reliance on defendant's protection and her appreciation of his kindness.

Since defendant, because of his confidential relation toward the testatrix, was required to show that the questioned written assignments from her to him were not the result of undue influence, he was entitled to show by parol any fact from which it could be inferred that the action of the testatrix was consistent with her previous tendencies and purposes.

The acts and declarations of two parties, concurring in the continued recognition and execution of a course of dealing involving the interests of both, are evidence tending to establish a previous understanding to that effect.

A gift by the testatrix to defendant, though he occupied a confidential relation to her, should be sustained where it appears that she was a woman of strong mind and quick apprehension, with an adequate knowledge of her property; that she acted free from undue influence, was fully advised as to the effect of the instruments she executed, did the business through her own attorney, reviewed her situation with him in the absence of defendant, acted in concert with her husband, provided for him to his satisfaction, and has neither surviving issue nor near relatives in need of her bounty.

Where a portion of a woman's share in an estate was being held by the executors, subject only to a burden imposed by her own act, in determining the validity of her gift of this fund, the rule as to the transfer of expectancies does not apply.

Where a testatrix made two assignments of property to defendant, one of all her interest in the estate of her brother and his wife, and the other of all the personal property she possessed at that date; these did not convey the proceeds of an annuity from a fund provided by her daughter and herself.

An assignment under seal and for valuable consideration is sufficient to convey property, regardless of the delivery of the subject-matter.

An assignment of personal property, not under seal, and made in consideration of gratitude for services rendered, should be treated as a gift, and when not accompanied by any delivery of the property, either actual or constructive, is void.

APPEAL IN CHANCERY, Washington County. Heard at Chambers, July 31, 1905, on the pleadings, master's report and exceptions thereto. Decree, *pro forma*, overruling the exceptions, and ordering that the defendant pay the orator the sum of seventy dollars and twenty-five cents, with costs. The orator appealed. The opinion states the case.

R. M. Harvey, E. M. Harvey and W. H. Taylor for the orator.

Where an antecedent fiduciary relation exists, a court of equity will presume undue influence, and cast upon the party in whom the confidence is reposed the burden of proving the contrary. *Pomeroy's Eq. Jur.* §955; *Richmond's Appeal*, 59 Conn. 226; *Pironi v. Corrigan*, 47 N. J. Eq. 135; *Rhodes v. Bate*, L. R. 1 Ch. 252; *Pisani v. Attorney General*, L. R. 5, P. C. 517; *Lewis v. J. A.*, 4 Edw. Ch. 599; *Tancre v. Reynolds*, 35 Minn. 476; *Planters' Bank v. Hornberger*, 4 Cold. 564; *Felton v. LeBreton*, 92 Cal. 457; *Miller v. Whelan*, 158 Ill. 544; *Morrison v. Smith*, 130 Ill. 304; *Rochester v. Levering*, 104 Ind. 562; *Brown v. Bulkley*, 14 N. J. Eq. 451; *U. S. v. Coffin*, 83 Fed. 337; *Bailey v. Woodbury*, 50 Vt. 166; *Mecham on Agency*, §§877-879; *Story Eq. Jur.*, §310; *Fetter on Equity*, 151; *Wright v. Vanderplank*, 8 De Gex., M. & G. 133; *Ralston v. Turpin*, 129 U. S. 675; *Hobday v. Peters*, 28 Beav. 349; *Nesbit v. Lockman*, 34 N. Y. 167; *Greenfield's Est.*, 14 Pa. St. 489; *Kisling v. Shaw*, 33 Cal. 425; *Huguenin v. Baseley*, 14 Ves. 275; *Willin v. Burdette*, 172 Ill. 117; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Howell v. Barker*, 4 Johns. Ch. 118; *McCormick v. Malin*, 5 Blackf. 509; *Thomas v. Turner*, 87 Va. 1; *Jennings v. McConnel*, 17 Ill. 148;

Elmer v. Johnson, 143 Ill. 513; *Yonge v. Hooper*, 73 Ala. 119; *Whipple v. Barton*, 63 N. H. 613; *Nesbit v. Lockman*, 34 N. Y. 167; *Gray v. Emmons*, 7 Mich. 533; *Worrall's Appeal*, 110 Pa. St. 349; *Davis v. Smith*, 43 Vt. 269; *Wheeler v. Willard*, 44 Vt. 640; *Mott v. Harrington*, 12 Vt. 199.

Zed S. Stanton and George W. Wing for the defendant.

If the court can see that there were no inequitable incidents, such as undue influence, great ignorance and want of advice, very inadequate price, and the like, it will not interfere merely because one party possessed very much less intelligence than the other, nor because the transaction is not one which in all respects the court approves. *Sawyer v. White*, 122 Fed. 223; *President etc. v. Merritt*, 75 Fed. 480; *Oxford v. Hopson*, 83 S. W. 942; *Mulloy v. Ingalls*, 4 Neb. 115; *Shea v. Murphy*, 164 Ill. 614; *Delaplain v. Grubb*, 67 Am. St. Rep. 788; *Hyman v. Wakeham*, 94 N. W. 1062; *Paulus v. Reed*, 96 *Ibid.* 757; *Reeve v. Bonwill*, 5 Del. Ch. 1; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Clark v. Malpas*, 31 Beav. 80; *Harrison v. Guest*, 6 DeGex., M. & G. 424; *Mann v. Betterly*, 21 Vt. 326.

The mere fact that a party was very old, or illiterate, or sick, or in pecuniary necessity, will not invalidate a transaction, or be ground for setting aside or defeating a contract, even though made upon an inadequate consideration and without advice, provided the evidence shows that he was competent to form an independent judgment, that he really knew the nature and effect of the transaction in which he was engaged, and acted in it intelligently and deliberately. To impeach such a transaction requires proof of actual fraud or coercion. *Lewis v. Pead*, 1 Ves. 19; *Villers v. Beaumont*, 1 Vern. 100; *Killian et al. v. Blodgett*, 27 Ark. 166; *Graham v. Castor*, 55 Ind. 559; *Stone v. Wilbern*, 83 Ill. 105; *Green v. Green*, 9 Grat. 330; *Pickerell v. Morss*, 97 Ill. 220; *Willemin v. Dunn*, 93 Ill. 511; *Curson v. Belworthy*, 3 H. L. Cas. 742; *Price v. Price*, 1 DeGex., M. & G. 308; *Cook v. Lamotte*, 15 Beav. 234; *Cowes v. Cornell*, 75 N. Y. 91; *McNeill v. Cahill*, 2 Bligh. 228; *Hunter v. Atkyns*, 3 Mylne & K. 113; *Hovenden v. Lord Annesly*, 2 Schoales & L. 607; *Murray v. Palmer*, 2 Schoales & L. 474.

MUNSON, J. At the time of the transactions in question Mrs. Hobart, the orator's testatrix, was about eighty years old. She and her husband were people of small means and limited business experience, inclined to narrow views and economical in their dress and living, but greatly interested in religious and missionary work, and liberal in its support. Their only daughter had lived with them much of the time, and had expended considerable sums in improving their place. Shortly before her death, realizing that her parents would be left without any near friend to care for and assist them, and acting with the knowledge of her mother, she requested Mr. Vail, the defendant, to see to them after her death, and he consented to do so. Vail was a merchant living and doing business in the testatrix' neighborhood, and active in town and church affairs. After the daughter's death, which occurred in October, 1887, he looked after and assisted the testatrix and her husband, both of whom had unbounded confidence in his ability and integrity.

Early in 1889, Mrs. Hobart inherited over \$35,000 from the estates of her brother and his wife, residents of Ohio, whose deaths occurred at about the same time. The husband died first, and both died testate, but the wills were such that the property passed as though there were none. Mrs. Hobart was one of four heirs entitled to share alike, and there was a half-brother, who took nothing under the laws of Ohio. Representatives of the estates, including Mr. Burton, an attorney, visited Mrs. Hobart in March, and arrangements were made for a further meeting at Montpelier. The defendant and Mr. Hiram A. Huse were present at this meeting. On this occasion Mrs. Hobart said she considered herself incapable of taking care of the property, and asked what she could do about it. Some one other than Vail or Huse suggested that as Mr. Vail was already looking after her affairs to some extent, he might undertake the care of this property. This seemed satisfactory to Mrs. Hobart, and Mr. Vail was asked if he would do it, and said that he would if it was Mrs. Hobart's request. Mr. Burton then drew up a power of attorney authorizing Vail to receive, invest and manage all the funds in question. At this interview, on the suggestion of representatives of the estate, Mrs. Hobart consented to an arrangement by which the half-brother was to have an equal share in the property. There was also some provision or arrangement by which the sum of \$13,420 of the estate was retained

to provide an annuity for Annie A. Strickland during her life. Mrs. Hobart's share, under the arrangement including the half-brother, and exclusive of her interest in the Strickland fund, was \$25,600. Five hundred dollars of this was left in Cleveland as a gift. The remainder came in a series of payments, beginning in March, 1889, and continuing until September, 1892. Mrs. Hobart gave receipts for the several remittances and indorsed the checks, but all further business connected with the fund was done by the defendant.

In June, 1889, Mrs. Hobart made her will, giving nearly all her estate to certain societies after the death of her husband, and giving \$200 to the defendant, and appointing him her executor. In December, 1891, she made a codicil, giving the defendant an additional legacy of \$1,000, and the gold watch formerly her brother's. The orator is the administrator with the will annexed.

In December, 1892, Mr. Huse and Mr. Howland went to Worcester for the purpose of making some disposition of the property of Mr. and Mrs. Hobart. A conversation was had between Mr. Huse and the Hobarts, mainly conducted on the one side by Mrs. Hobart, in which Mrs. Hobart's purpose and wishes were stated, and the effect of what she proposed was explained by Mr. Huse. The main part of the conversation was taken down in shorthand by Mr. Howland, and the conversation is found to have been as shown by his minutes, a copy of which is incorporated in the report. After this conversation Mr. and Mrs. Hobart executed deeds conveying their real estate to Vail, and Vail executed a life lease of the same to the Hobarts; which lease the master says was delivered to and kept by Mrs. Hobart's attorneys, Dillingham, Huse & Howland.

Messrs. Huse and Howland visited Worcester again on the 27th of January, 1893; and on this occasion Mrs. Hobart gave Vail an assignment of all her interest in the estates of her brother and his wife, including her interest in the Annie A. Strickland fund, and signed a discharge of a mortgage which Vail had given her October 3, 1891, to secure an existing indebtedness and any that might afterwards accrue. At the same time Vail gave Mrs. Hobart a writing by which he agreed to render to Mrs. Hobart, while he lived and was capable of doing it, such personal service as he had performed for her the previous year, and to pay her in each year of her life six hundred

dollars as it might be demanded; and also made a will by which he gave her, in case she survived him, the sum of \$15,000. It appears further that at or about this time Vail had his life insured for \$15,000 for Mrs. Hobart's benefit. On the 10th of March following Vail executed a mortgage to Mrs. Hobart covering the premises deeded him by the Hobarts and other lands, and conditioned to secure the performance of his agreement of January 27, which mortgage was recorded March 21. On the first day of April Vail delivered this mortgage and a certificate from the town clerk to Dillingham, Huse & Howland, and received from them the discharge of his mortgage of 1891 which Mrs. Hobart had signed January 27, and the notes secured by said mortgage. A few weeks later, the Hobarts gave Vail a bill of sale covering all their personal chattels of every description.

The master finds that at the time these papers were executed both Mr. and Mrs. Hobart were in good health, and in possession of their mental faculties; that Mrs. Hobart had always been a person of strong mind and will, with strong likes, dislikes and prejudices, and was at this time bright and keen; that Mr. Huse fully and particularly explained all these matters to Mr. and Mrs. Hobart, and discussed the details of them with great care; that the value of the personal estate was talked over, and the amount called \$17,000; and that no undue influence was had or exercised to procure the transfers.

The orator excepted to the use of evidence tending to show any understanding not covered by the papers, and now insists that the nature of the transaction is to be derived from the papers alone, and that the arrangement evidenced by the papers was merely a contract, and that being a contract its validity will depend largely upon the adequacy of the consideration. The master has left the construction of these papers, and the nature of the transaction evidenced by them, to the determination of the court.

The master has incorporated in his report, not as a finding of fact, but as an admission, for whatever bearing it may have upon the subsequent acts of the parties, a statement in the answer, which is, in substance, that about December first, 1892. the testatrix and her husband proposed to give the defendant what property they then had, if he would furnish them a stipulated sum annually, and allow the testatrix to make such donations as she desired out of the property, and maintain a home

for them, and care for them during their lives as he had done for several years previous; and that he accepted the proposition, and that the writings above described were drawn to effectuate this agreement. The master finds, independently of the papers, if permissible to find it from the above statement and from the conduct and statements of Mrs. Hobart and the defendant subsequent to the execution of the papers, that Mrs. Hobart always understood that she would be allowed by the defendant to make such donations as she desired to out of the personal property and out of any of the real estate she had deeded him. It appears that Mrs. Hobart continued to contribute liberally for missionary and charitable purposes long after the deeds and assignments were made, and that funds for this purpose were furnished by the defendant. It also appears that she once contemplated making a gift of some of the real estate conveyed to the defendant, and that the defendant consented to this in writing, but that nothing further was done about it.

The report was submitted to counsel for their suggestions before filing, and in view of certain requests made by the orator the master reported further, that there was no direct evidence upon the question of undue influence, that the orator claimed the burden was on the defendant to show that the execution of the papers was not procured by undue influence, and that he did not pass upon the question of law, but made his finding that there was no undue influence upon a consideration of certain facts, circumstances and evidence thereafter stated, in connection with other evidence not referred to. The master then refers to the daughter's request in contemplation of her death, the suggestion of the defendant's name in the conference at Montpelier, the conversation at the time the papers were made as shown by Mr. Howland's minutes and his evidence in respect thereto, the relations existing between Mr. and Mrs. Hobart and the defendant, the service the defendant rendered and Mrs. Hobart's appreciation of it as shown by the testimony of witnesses referred to, and Mrs. Hobart's strength of mind and will; and says that if any of these tend to show that no undue influence was exercised he finds that fact by a fair balance of evidence. Upon the filing of the report the orator excepted to it because the master had not considered the presumption existing, upon the facts shown, that Vail used undue influence.

The master also reports, upon the orator's request, that so far as appeared before him Dillingham, Huse & Howland were the only attorneys either Mr. or Mrs. Hobart or the defendant consulted, and that they acted for both parties in making the papers referred to.

It is unnecessary to consider the questions discussed as to the precise relation which the defendant sustained to Mrs. Hobart before the transfers. It was unquestionably a confidential relation, and such as cast upon the defendant the burden of showing that Mrs. Hobart was mentally competent, and did what she did without undue influence, and with full knowledge of her property and of the nature and effect of her act. He had the possession and management of her entire estate, and was her trusted adviser in all matters. The rule invoked by the orator applies in every case where a confidence has been reposed which gives the person confided in an advantage over the one reposing the confidence. Note to *Richmond's Appeal*, 21 Am. St. 101, 103; *Fisher v. Bishop*, 108 N. Y. 25; *Reed v. Peterson*, 91 Ill. 288; *Van Epps v. Van Epps*, 9 Paige 237; *Shipman v. Furniss*, 69 Ala. 555; *Pironi v. Corrigan*, 47 N. J. Eq. 135, 20 Atl. 218; *Wilson v. Mitchell*, 101 Pa. St. 495.

It is true, as urged by the orator, that the master has not found in terms that Mrs. Hobart understood the nature and effect of the deeds, assignments and agreements, or the amount and condition of her property. But he has found that she was a person of strong mind, in possession of her faculties, and that the transaction was fully and particularly explained to her. This amounts to a finding of the necessary understanding. And we think it sufficiently appears that she had an adequate knowledge of her property. Her connection with and knowledge of the real estate into which a part of the money had been converted, is apparent from the report. There is nothing in the report to impeach the substantial accuracy of the sum mentioned as the amount of the personal property. Her interest in the Annie A. Strickland fund, not then in hand, cannot have been overlooked, for it is specifically mentioned in the assignment.

If it be considered that the circumstances were such as required that she have the benefit of independent and disinterested advice, the facts bearing upon the matter are fully presented. No question is made as to the capability and integrity

of her adviser. But the orator claims that the relations of Mr. Huse to Vail were such that his advice did not meet the requirement. It appears plainly enough from the report that Dillingham, Huse & Howland were the attorneys of Mrs. Hobart, except so far as that relation was modified by their acting for both parties in making the necessary papers. We think that relation to Mr. Vail was not one that deprived the advice of Mr. Huse of the quality which the law requires. The position of an attorney who acts for both parties, to the knowledge of each, in the preparation of papers needed to effect their purpose, and gives to each the advice necessary for his protection, is recognized by the law as a proper one. It is evident that Mr. Huse was fully aware of the nature of that relation, and sensible of the obligation it imposed. As a result of the taking of the conversation in shorthand, we have before us what was said to Mrs. Hobart with a fullness and certainty seldom attainable. Referring to Mrs. Hobart's expressed intentions as regards Mr. Vail, Mr. Huse said to her: "It would be my duty to make out any papers that you want made out, * * but I should think I was derelict in my duty to you if I came as your lawyer to execute papers giving Mr. Vail a possible benefit, when there was any possibility that the reason of that was because he had overpersuaded you to it." And after further conversation Mr. Huse said: "This ought not to be left in such shape that Mr. Vail would * * be blamed for appropriating what is intended for him, and on the other hand it should be guarded so that he wouldn't appropriate for himself what is intended for some one else."

Several questions are raised regarding the finding that there was no undue influence. The master makes this finding, if any of certain matters hereinbefore stated tend to support it. It is clear that some of them do. The master does not say upon whom the burden of proof rests as matter of law, but he makes an affirmative finding that there was no undue influence, which is a sufficient finding if the burden was on the defendant. The finding is made by a balance of evidence. It is not claimed that anything more is required. But the fact must be affirmatively found against the presumption to the contrary. The report is excepted to because the master did not consider this presump-

tion in reaching his conclusion. There is nothing to indicate that he did not consider it. The most that can be said is that it does not affirmatively appear that he did. The orator made requests for further findings upon this subject, but was silent as to this particular. It may be questioned whether as a matter of practice such an exception should be considered when the report has been submitted to the inspection of counsel before filing, and they have availed themselves of the opportunity to make such requests upon the subject as they desired. But it is not necessary to pass upon this question of practice. A majority of the court are clear that this matter is within the rule that the proceedings of special masters are presumed to be correct, and that the burden is on the excepting party to see that the claimed error affirmatively appears. It is also argued that the finding that "no undue influence was had or exercised" to procure the transfers must refer to the direct employment of undue influence, and that it does not negative the effect of the influence naturally resulting from Mrs. Hobart's reliance upon the defendant's protection and her appreciation of his kindness. But when it is considered that the master weighed the presumption of undue influence in favor of the orator, a finding in these terms can mean no less than that the transfers were not the result of undue influence.

We have seen that the finding of Mrs. Hobart's understanding regarding her right to make gifts notwithstanding the conveyances is based upon a statement in the answer and upon the conduct and statements of Mrs. Hobart and the defendant after the conveyances were executed. It is urged that parol evidence could not be used to show an agreement not embraced in the writings, and that if Mrs. Hobart's understanding in this respect was material in any way, it could not be found from the evidence above stated. This finding will not be essential in classifying the transaction, but it may have affected other conclusions of the master, and it will therefore be necessary to consider the objections to the evidence on which it is based.

It is clear that parol evidence was admissible to show an understanding of this nature not disclosed by the papers. The bill charged the invalidity of certain instruments which the defendant was required to sustain. To establish their validity, it was necessary to prove that they were not procured by undue influence. This entitled the defendant to show any fact from

which it could be argued that Mrs. Hobart's action was consistent with her previous tendencies and purposes.

We think the conduct and statements of Mrs. Hobart and the defendant subsequent to the execution of the papers could properly be considered in ascertaining what Mrs. Hobart's understanding in this respect was at the time of their execution. It seems clear that the acts and declarations of two parties, concurring in the continued recognition and execution of a course of dealing involving the interests of both, are evidence tending to establish a previous understanding to that effect.

The statement in the answer of the agreement which led to the execution of the papers, taken as a whole, must be regarded as a development of the ground of the defence, and not as an admission. The finding, however, is not coextensive with the averment, but is merely that Mrs. Hobart always understood that she would be allowed to continue her donations. This finding might be given an effect unfavorable to the defendant in reaching further conclusions from all the evidence, and if it was to be so used the clause supporting it might properly be treated as an admission. The master, in finding the ultimate facts reported, must have given this subsidiary fact, found in part from the clause referred to, a bearing favorable to the orator; for, in the findings made subsequent to the requests, he says: "In finding the facts hereinbefore reported, I have not treated the defendant's answer as evidence in his favor, but in so far as it supported any claim of the orator I have treated it as an admission in the orator's favor."

So we have all the findings necessary to establish the validity of a gift to one who sustains a confidential relation to the giver. It is not necessary to consider the transaction with reference to the nature and value of the obligations assumed by the defendant. The transaction was not wholly a contract. It was a contract in so far as it provided for the future support of Mr. and Mrs. Hobart and secured that support on some of the property transferred. It was an intended and completed gift of her property as against the right of inheritance and of testamentary transmission. It was a transfer made upon an understanding that she could still avail herself of the property as a fund for charitable donations, but with her full knowledge that this privilege depended solely upon an unenforceable agreement, and that what remained in the defendant's hands at her

death would be his absolutely. It appears plainly enough from her conversation with Mr. Huse that she expected that the arrangement would result in a substantial benefit to the defendant. She spoke of disposing of some of the property herself if she wanted to, and said she wanted he should have the real estate anyway. The conversation shows that her family connections were in mind when she determined upon this course. Her nearest relatives were her half-brother and his children. She had readily assented to an arrangement by which this half-brother received nearly \$30,000, one-fourth of which was her own gift. She made the transfers in question to one whom her daughter had chosen to look after her, whose kindness she had experienced before the property was acquired, and who continued until her death to treat her with a kindness so constant and complete that it has been characterized as excessive, and urged as proof of a previous sinister design. The fact that she evidently expected that a part of the property left in the defendant's hands at her death would ultimately be devoted to charitable purposes and that this expectation may fail of fulfillment, cannot avail to defeat the gift. It is not necessary to review the many cases brought to our attention in which gifts made to persons sustaining a confidential relation to the donor have been held invalid. It is clear that this case is well within the rule under which such gifts are sustained. A woman of strong mind and quick apprehension, with an adequate knowledge of her property, free from undue influence, fully advised as to the effect of the instruments she executes, doing the business through her own attorney and reviewing her situation with him in the absence of the intended beneficiary, acting in concert with her husband and providing for him to his satisfaction, having no surviving issue and no near relatives in need of her bounty,—may well be suffered to dispose of her property as she sees fit.

It remains to dispose of some questions raised as to certain classes of property that are claimed to stand differently from the bulk of the estate. It is said that Mrs. Hobart's interest in the Annie A. Strickland fund was property of a character that could not be transferred, and that in any event there was a want of sufficient delivery. The report shows that the Strickland estates passed as though there were no wills. Then the fund from which the annuity was derived must have been provided by an agreement among the heirs. So Mrs. Hobart's share in

this fund had in effect been made over, and was being held by the executors by her permission, subject only to a burden imposed by her own act. It is therefore unnecessary to inquire as to the nature and application of the rule regarding the transfer of expectancies. The question of delivery is not important, for this transfer was for a valuable consideration, although conferring an important benefit. In any event, the assignment under seal was sufficient to pass the property. *Connor v. Trawick*, 37 Ala. 289, 79 Am. Dec. 58.

Mrs. Hobart received an annuity of \$240 which passed into the hands of the defendant. This was derived from a fund of \$2,500, provided by her daughter, and from \$1,000 paid in by herself in April, 1893. The report contains nothing that requires us to distinguish between these funds. This annuity is not within the terms of either assignment. The first is confined to her interest in the estates of her brother and his wife. The second is of all the assignor's personal property, enumerating a great variety of personal chattels, and closing with the statement, "meaning to convey * all personal property * possessed at this date." This language cannot be held to cover the proceeds of the annuity. The defendant must account for all monies received from this source.

Mrs. Hobart had a life lease of both the village property and the farm. There were two houses on the village lot, one of which she occupied. Whatever income the defendant may have received from the tenant-house and the farm is to be accounted for.

The conveyance of the household goods and other personal chattels is not under seal. It cannot well be sustained on the consideration disclosed by the earlier transaction. So the transfer must be treated strictly as a gift. Mrs. Hobart continued to use the property until her death, after which the defendant took possession of it. No facts appear bearing upon the question of a constructive delivery by one party, or the assertion of any control by the other. The intended gift was ineffectual for want of delivery, and the defendant must account for the value of this property as of July 4, 1902, the date of Mrs. Hobart's death.

Pro forma decree reversed, and cause remanded with mandate that an accounting be had of the matters stated, and that a decree be thereupon entered in accordance with this opinion.

FRED C. DAVIS v. J. C. FARWELL.

October Term, 1906.

Present: TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed May 20, 1907.

*Attorney and Client—Attorney's Lien—When Permissible—
Book Account—Evidence.*

Though an attorney's lien on money in his hands is denied by the client for whom it was collected, the attorney may pay over the whole fund, without prejudice to a subsequent suit for his fees.

In an action by an attorney for services in making a certain collection, his right of recovery is not affected by the fact that, on demand, he paid over all of the collection in his hands, and took and retained a receipt therefor, stating that the payment was "in settlement" of the money collected.

A charge is not essential to a right of recovery for services rendered; but a charge, or a mistaken charge, or the failure to charge may be important evidence as to the right of recovery.

The relation of attorney and client is one of trust and confidence, and requires the utmost good faith on the part of the attorney.

Where an attorney has done his client's business with due fidelity, he may hold any of his client's money or papers, that come into his hands in the course of that business, as security for the payment of his fees.

It is not decided what rule governs as to an attorney's right to pay for services rendered in making a collection, where, though the services are of some benefit to the client, the attorney detains the client's money in bad faith, and not honestly as security for the payment of his fees, thereby forcing the client to sue for the money collected.

In an action of Book Account by an attorney for services in making a collection, the auditor's report examined, and *held* that it fails to show that plaintiff detained the proceeds of the collection in bad faith, and not honestly as security for the payment of his fees.

An attorney, when asked by his client to account for \$15 in his hands as part of the proceeds of a collection, insisted upon retaining that

money as payment for his services in making the collection, but finally agreed to retain only \$5 for his services and to pay over the balance as soon as he could. Later the client demanded payment of the whole sum, thereupon the attorney paid it over, and immediately brought this suit to recover for his services in making the collection. *Held*, that plaintiff's agreement to retain only \$5 for his services and pay over the balance was without consideration, and so not an accord and satisfaction, and that the client repudiated that agreement by demanding and receiving the whole amount collected.

In Book Account by an attorney to recover for services, defendant's evidence, offered for the purpose of showing that plaintiff had harassed him, that defendant had been twice sued on the same matter, but without indicating when the suits were brought nor how they resulted, was properly excluded as immaterial.

In Book Account by an attorney to recover for services in a collection made through a foreign attorney, plaintiff testified in his opening, without objection, as to how much he had received from the foreign attorney and what his charge was, and then, in corroboration, offered the latter's letter which stated that the writer had received \$25, retained \$10, and remitted \$15 to plaintiff, which letter was excluded, on defendant's objection. On cross-examination, plaintiff denied having told defendant that the foreign attorney had collected \$40, retained \$15, and remitted \$25 to plaintiff, as defendant subsequently testified, but admitted having had a talk with defendant in which he told him as he had testified in direct, and that he then showed him the letter. *Held*, that the letter was properly admitted in rebuttal, not as proof of its contents, but as bearing upon the probability of whether plaintiff would have made the statement testified to by defendant.

BOOK ACCOUNT. Heard on the auditor's report and exceptions thereto, at the June Term, 1906, Windsor County, *Rowell, J.*, presiding. Judgment for the plaintiff. The defendant excepted. The opinion states the case.

Davis & Davis and *F. H. Clark* for the defendant.

An attorney cannot recover for services, which, by reason of his unfaithfulness, are of no benefit to his client. *Bracy v.*

Carter, 12 A. & E. 373; *Hill v. Featherstonbough*, 7 Bing. 569; 1 Parsons on Contract, 123; *Brodin v. Kingland*, 4 Wats. (Pa.) 420; *Currie v. Cowles*, 6 Bosw. 452; *Herrick v. Cutley*, 1 Daly 512; *McClosky v. Gleason*, 56 Vt. 264; *Spaulding v. Wakefield*, 53 Vt. 660; *Farwell v. Shaw*, 46 Vt. 468.

F. C. Davis for the plaintiff.

MILES, J. This is an action in book account brought by the plaintiff, an attorney at law, against the defendant, to recover for professional services. The case was tried by an auditor who reported in substance, among other things unnecessary to state, that in September 1898, the defendant employed the plaintiff to make a collection against one Hope of Fitchburg, Mass. The plaintiff turned the matter over to J. E. McConnell, a Fitchburg attorney, to assist him in its collection, by whom a suit was shortly thereafter brought against the debtor, Hope. The plaintiff retained the general charge of the matter, wrote several letters regarding it, and went to Fitchburg at least once to see about this and another demand which he held against Hope in favor of another client.

About March 1, 1899, and after said suit was brought, Hope paid McConnell twenty-five dollars on defendant's claim against him, and sent forty or forty-one dollars direct to the defendant. The report does not show whether the sum paid to McConnell and the sum sent to the defendant settled the whole demand of the defendant against Hope; but in view of the fact that McConnell sent fifteen dollars of the twenty-five to the plaintiff and retained ten dollars for his own fees in that suit, it is fairly inferable that the matter was then closed. However that may be, the auditor has found that the plaintiff never received on account of that collection, more than the fifteen dollars so sent to him by McConnell. This sum he appropriated to his own use, and when called upon by the defendant to account for it, in the following June, he claimed to be entitled to it on account of services rendered in making that collection. The defendant objected to the plaintiff's charge, and thought that five dollars was as much as the plaintiff was entitled to receive. Finally the plaintiff told the defendant that he would take five dollars for what he had done in the case and promised to pay the balance as soon as he could. The defendant did not consent to this delay

and thence continued to dun the plaintiff from time to time until Feb. 1, 1904, when he put the matter into the hands of G. A. Davis, an attorney of Windsor, Vt., who immediately wrote to the plaintiff demanding pay in full of the sum received by him. The plaintiff thereupon sent Davis his check for ten dollars, which was immediately returned to the plaintiff in a letter declining to accept that sum in full, and insisting upon the plaintiff's paying the full sum which he had collected and then had in his possession. The plaintiff then sent Mr. Davis his check for fifteen dollars and in due time received from Mr. Davis a receipt, stating that he had received that sum "in settlement of money collected of Mr. Hope." This receipt was received by the plaintiff about February 6, 1904, and on the 11th day of the same month, he sent to the defendant a bill demanding of him ten dollars for his services in making the Hope collection, and therein notifying the defendant that unless the same was paid within five days from that date suit would be brought. The defendant not paying within the time named, this suit was brought. In the justice court the plaintiff sought to recover only the sum of ten dollars and he recovered judgment in that court for only that amount and costs. In the county court his specifications were for fifteen dollars and he sought to recover that sum in that court.

The first claim made by the defendant is, that the facts found by the auditor entitle him to a judgment: first, because the plaintiff yielded to the defendant's demand, and paid the full sum collected without deducting anything for his services for which he now sues; second, because he kept the receipt sent to him by Mr. Davis; third, because the plaintiff never made any book charge of his account until he paid the fifteen dollars and then only charged ten dollars; fourth, because his services were of no value to the defendant; and fifth, because he was unfaithful to his client in not paying over the money on demand.

We do not think the plaintiff disentitled himself to any debt that the defendant owed him, by acceding to the demand of the defendant to pay him the full amount of the sum collected. Where the attorney's lien upon the fund in his hands is denied, he may pay over the whole amount and will then be entitled to a subsequent action against his client for his fees. *Walton v. Dickerson*, 7 Pa. St. 376. By turning the whole sum over to the defendant, the plaintiff simply released his lien upon the sum

collected, but retained his debt against the defendant, secured only by his personal undertaking. When the money was collected and came into the possession of the plaintiff, he took it with the right to hold it until his fees were paid, as security for the payment of his debt against the defendant. *Hutchinson et al. v. Howard et al.*, 15 Vt. 544; *Hulbert v. Brigham*, 56 Vt. 368. If the plaintiff saw fit to relinquish his right of lien, even under threat of the defendant's attorney, he relinquished no right to his debt secured by that lien; for the two debts stood distinct and independent of each other, subject to enforcement in independent suits. *Walton v. Dickerson*, *supra*. Therefore, when the plaintiff paid to the defendant's attorney all that he had received on the Hope collection, he still had his debt against the defendant for his reasonable compensation for services rendered, if not otherwise disentitled.

We think his right to recover was not affected by the retention of Mr. Davis' receipt. That simply shows that the plaintiff has settled with the defendant for the money collected. Neither is the plaintiff precluded from a recovery because he made no charge for his services at the time they were rendered. A charge is not necessary to a right to recover. The debt is not created by the charge. The charge as made, or the omission to charge, may serve as evidence of the existence or non-existence of the debt and of the understanding of the party making it at the time it was made, and is proper evidence to be weighed by the trier of the fact for that purpose; but the debt always precedes the charge and must exist before it is made, and the omission to charge will not extinguish it, nor will a mistaken charge affect it, only as the fact bears as a piece of evidence upon the fact of whether a debt ever existed.

The objection of the defendant to a judgment for the plaintiff, because the services of the plaintiff were worthless, is not well taken; because, the auditor has found that they were reasonably worth ten dollars.

The fifth reason stated by the defendant why the judgment below should have been for him presents a question involving the attorney's right to detain the money of his client as security for the payment of his fees. The relation of attorney and client is one of trust and confidence, and requires the utmost good faith and fair dealing on the part of the attorney. *Cox v. Sullivan*, 7 Ga. 144, (50 Am. Dec. 386). When the attorney

has so conducted himself in the transaction of his client's business, he becomes entitled to his fees, and may hold the papers and money of his client coming to his possession in the performance of that business, as security for the payment of his fees; but, if he so conducts his client's business that his services become of no value to him, he cannot recover for such services. *Nixon v. Phelps*, 29 Vt. 198; *Hopping v. Quinn*, 12 Wend. 517; *Hill v. Featherstonebough*, 7 Bing. 569. Some of the authorities go farther and hold that, if the attorney detains the money of the client in bad faith and not honestly as security for the payment of his fees, in consequence of which the client is compelled to resort to a suit against him to recover the money so collected, the attorney will not be allowed anything for his services in making the collection, although of some benefit to the client. Such is the case of *Bredin v. Kingland*, 4 Watts. (Pa.) 420, and several other cases from that State to which this rule seems to be very nearly confined. In Massachusetts the rule seems to be that in a suit by the client to recover money so detained, the attorney will be allowed a reasonable compensation for his services, to be deducted from the sum collected. *Soper v. Manning*, 147 Mass. 126, (16 N. E. Rep. 752). In *Burns v. Allen*, 15 R. I. 32, (2 Am. St. Rep. 844), 23 Atl. 35, it is held, that where the case presents simply a difference of opinion as to the fair amount of fees to which the attorney is entitled, the attorney will be allowed a reasonable compensation, although he retained the whole sum collected as security for his pay. Some courts hold that, if the attorney sues for his fees, the client's remedy for a wrongful detention of papers or money held by the attorney under a claim that he is doing so in the exercise of his right of lien, is by way of recoupment of the damages which the client has sustained in consequence of such detention, leaving the punishment of the attorney for such wrongful detention with the court to be enforced by disbarment proceedings, instead of taking away his right to recover from the client a reasonable compensation for the benefit received by the client on account of the attorney's services. Without attempting to extract from these various cases, seemingly to be in conflict with each other in some respects, a reasonable rule upon which all can rest, but assuming, without deciding, that the law in this State is like the rule of the Pennsylvania courts, which deprives the attorney of all right to any compensation for his services, where he has,

in bad faith detained money collected for his client, we will examine the report and see if the plaintiff has been guilty of bad faith and unfair dealing in the detention of the defendant's money.

The report, as we have seen, fairly shows that on or about the 1st day of March, 1899, the collection of sixty-five or sixty-six dollars was made by the plaintiff after suit brought, of which forty or forty-one dollars went to the defendant, ten dollars to McConnell, the Fitchburg attorney, and fifteen dollars to the plaintiff. No complaint is made by the defendant concerning the ten dollars retained by McConnell as his fees, and the auditor has found that ten dollars of the fifteen sent to the plaintiff by McConnell, was reasonably due him from the defendant for services rendered in making that collection. No question can be raised, in the light of the above authorities but that the plaintiff had the right to retain enough of the collection, in the first instance, to secure the payment of what was reasonably due him for his services in making the collection; but the defendant claims that when the plaintiff agreed to take five dollars for his services there was an accord and satisfaction of his demand against the defendant and that thereafter he held the ten dollars, which he had promised to pay to the defendant as soon as he could, as the original money collected, and hence held it in bad faith and without right. The report, however, does not show that it was an accord and satisfaction of the plaintiff's demand. At most it was only an accord without satisfaction, a promise without consideration. Being an accord simply, neither party was bound by it; *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749; *Cutler v. Smith*, 43 Vt. 577; *Rising v. Cummings*, 47 Vt. 345; besides the defendant himself has repudiated it, and has since demanded and received full pay for the whole amount collected; and when so demanded and paid the matter thereafter stood the same as before the agreement. In these circumstances the plaintiff's right to hold the money as security remained unchanged and existed as in the first instance, and he was justified in holding it. The defendant's attorney argued that the charge of fifteen dollars was excessive, and was so made with the purpose of retaining more of the defendant's money than he had a right to hold as security for what was really due him, and therefore he was guilty of bad faith. We do not think the case shows bad faith because the plaintiff claimed fifteen dollars for

his services, although that was five dollars more than the auditor has found due him. No agreement having been made in advance as to how much the plaintiff was to receive for his services, the law fixed the amount at a reasonable sum. What that sum was, the plaintiff could not fix definitely, and the most he could do, in the exercise of good faith towards his client, was to fix it at what he thought was reasonable. An honest mistake in fixing the amount, and the detention of a slight sum in excess of what was ultimately found due him, would not amount to a detention of the defendant's money in bad faith so as to prevent the plaintiff's recovery of his reasonable fees, even under the Pennsylvania rule. From what the report shows the plaintiff did about this collection, we cannot say as a matter of law, that his charge of five dollars more than the auditor has found reasonably due him, shows unfaithfulness to his client and intentional dishonesty. Nor do we think the fact that this matter ran along as it did, shows it. Either party could have instituted proceedings to have terminated this dispute and the omission to do so is chargeable to one party as much as to the other. What was said and done in June following the collection, about the charge of the plaintiff, is not inconsistent with this view of the matter. The plaintiff then insisted, as he now insists, that his services were worth that sum, but the defendant insisted that they were not, and finally the plaintiff agreed with the defendant, that his charge should be five dollars, and that he would pay the defendant the ten dollars as soon as he could. This agreement or offer to settle is not shown by the report to be anything more than a manifestation of a disposition on the part of the plaintiff finally to dispose of the matter, without regard to his existing rights, by charging the defendant five dollars and giving him credit for the fifteen dollars which he had collected, supplemented by the plaintiff's promise to pay the balance as soon as he could. That such was the purpose of the plaintiff is quite apparent from the fact that he offered to settle for less than the auditor has found due him. Neither is his final offer to pay Mr. Davis his check for ten dollars, inconsistent with good faith in the detention of the money and his claim that his services were worth fifteen dollars. It simply showed a willingness to abide by his former offer.

No bad faith being imputable to the plaintiff on account of his claim that the defendant reasonably owed him fifteen dollars

for the services which he had rendered in that collection, his detention of enough of the money collected to secure the payment of the sum claimed, does not defeat his right to recover what was reasonably due him, even under the Pennsylvania rule.

The auditor submitted to the court below, the question of whether the plaintiff could recover more than five dollars because of his offer to take that sum for his services at the time of his talk with the defendant in June following the collection. We do not think that question is before us. The report shows, as we have already said, that the offer as made by the plaintiff was repudiated by the defendant, and he makes no claim for it in his brief, but therein also repudiates it.

The second point raised by the defendant is on an exception to the auditor's report. One of the exceptions to the report is to the exclusion of evidence tending to prove that the plaintiff had sued the defendant twice on this same matter, which was offered to show that the plaintiff had harassed the defendant. The offer did not show nor indicate when they were brought nor what became of them, nor how they bore upon any issue in the case. The evidence was properly excluded, as it was wholly immaterial.

The other exception was to the admission of a letter purporting to have been written by said McConnell. In the opening of the plaintiff's case, he testified without objection as to how much he had received from McConnell on the defendant's claim, and what McConnell's charge was. He then offered the letter which stated that McConnell had received twenty-five dollars, ten of which he kept and the remaining fifteen dollars he inclosed to the plaintiff. The letter was offered by the plaintiff to corroborate his testimony thus given, but upon the defendant's objection the same was excluded by the auditor. On cross-examination the defendant's attorney asked the plaintiff whether at a certain time he did not tell the defendant that McConnell had collected forty dollars instead of twenty-five, and had kept fifteen and sent twenty-five to him. The defendant testified that the plaintiff did tell him so. The plaintiff denied it, but admitted having had a talk with him in which he told the defendant as he had testified in direct, and that at that time he showed him the letter which had been excluded by the auditor. In rebuttal the plaintiff again offered the letter, not as proof of its contents, but as bearing upon the probability of whether he

would make such a statement in the face of a paper purporting to show that such a statement was false, and it was received for that purpose alone. The letter was properly received. It was unimportant whether the letter was written by McConnell or by somebody else. It was not received for the purpose of establishing the truth of its contents; but was received as evidence bearing upon the question of whether the plaintiff made the statement which the defendant testified he did.

Judgment affirmed.

IN RE HENRY A. BOWERS.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed May 22, 1907.

Intoxication—Prosecution—Sentences—County Jail—V. S. 5206, 5210, No. 200, Acts 1906.

SINCE No. 200, Acts 1906, repealed all Acts and parts of Acts inconsistent therewith, and §8 requires that all imprisonments for being found intoxicated shall be in the county jail, that Act repealed so much of V. S. 5206, 5210, as requires imprisonment in the house of correction in cases of conviction for being found intoxicated.

HABEAS CORPUS, returnable before the Supreme Court for Washington County at its May Term, 1907, and then heard. The opinion states the case.

Harvey, Harvey & Harvey for the relator.

Clarke C. Fitts, Attorney General, and *Benjamin Gates*, State's Attorney, for the State.

ROWELL, C. J. The complainant seeks by *habeas corpus* to be discharged from further serving an alternative sentence in Washington County jail, taking effect at the expiration of a term of imprisonment therein, for the nonpayment of a fine with costs imposed on a second conviction for being found intoxicated.

He relies upon V. S. 5206. But that section applies only to cases in which a fine is imposed and no other sentence is passed; in which case, if the fine is not paid in twenty-four hours, it requires imprisonment in the house of correction. But that section and V. S. 5210, taken together, cover the case, if those sections are still in force as to this class of cases. Section 5210 provides that when a person over a certain age is convicted of an offence punishable by fine or imprisonment or both, and is sentenced to both, the sentence as to the fine shall be the same alternative sentence as where a fine only is imposed, and shall take effect at the expiration of the term of imprisonment.

But said sections are not in force as to this class of cases, for section 8, No. 200, Acts of 1906, provides that *all* imprisonments for being found intoxicated shall be in the county jail of the county in which the offence is committed. This is inconsistent with said sections; and as the act of 1906 repeals all acts and parts of acts inconsistent therewith, so much of said sections as required imprisonment in the house of correction in this class of cases is thereby repealed; and now, all imprisonments for being found intoxicated must be, as the statute says, in the county jail of the county in which the offence was committed.

This is not like *Sammon's* case, 79 Vt. 521, 65 Atl. 577. There the complainant was in the county jail for assault and battery, under a sentence of imprisonment and an alternative sentence for the nonpayment of a fine. It was held that section 8 of the act of 1906, as far as it relates to breaches of the peace, has reference only to imprisonment by direct sentence, and not imprisonment by an alternative sentence, and consequently that said section is not in conflict with the sections of the Vermont Statutes referred to, and that they are not, in the respects there involved, repealed by said act.

Judgment that the complainant is lawfully imprisoned, and that he be remanded to the custody whence he was taken.

LINDLEY M. FLEET v. OTIS H. WAIT.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed June 5, 1907.

*Covenant—Covenants of Title and Against Incumbrances—
Breach—Declaration—Sufficiency.*

A declaration for breaches of the ordinary covenants in a warranty deed is bad on demurrer, where the only breach relied on is eviction by a city under an agreement with defendant, made more than two years before plaintiff's deed, to give it five feet of the land for widening a street, on condition that the work should be done that year, and there is no allegation of the time when the city entered upon the premises.

An agreement by an owner of lots to give the city five feet therefrom for widening a street, on condition that the work should be done that year, does not constitute an "incumbrance" within the meaning of a covenant against incumbrances in a deed of the land executed two years later.

COVENANT. Heard on general demurrer to the declaration, at the December Term, 1906, Windsor County, *Taylor, J.*, presiding. Demurrer sustained, *pro forma*, and declaration adjudged insufficient. The plaintiff excepted. Cause passed to the Supreme Court before trial. 'The opinion sufficiently states the substance of the declaration.

W. F. Stephens and *Harvey, Harvey & Harvey* for the plaintiff.

The eviction set forth in the declaration constitutes a breach of the covenants of seisin. A covenant of seisin has been defined to be "an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey." It is broken if there is a material deficiency in the

quantity of land called for by the deed. *Wetzel v. Richcreek*, 40 N. E. 1004; *Real v. Hollister*, 29 N. W. 189.

Said eviction is also a breach of the covenant against incumbrances. *Spurr v. Andrew*, 6 Allen 420; *Prescott v. Truman*, 4 Mass. 627; *Kellogg v. Ingersoll*, 2 Mass. 97; *Blake v. Everett*, 1 Allen 248; *Shute v. Barnes*, 2 Allen 598; *Isele v. Arlington Sav. Bank*, 135 Mass. 142.

Frederick C. Southgate and Stickney, Sargent & Skeels for the defendant.

MUNSON, J. The declaration is for breaches of the covenants in a deed of certain lots in Brockton, Mass., is in two counts, and is demurred to generally. Both counts allege an eviction by the city under an agreement of the defendant to give five feet from the front of said lots for widening the street. This is set up in the first count as a breach of each of the several covenants, and in the second count, as a breach of the covenant against incumbrances. The defendant's agreement, as set up in both counts, is dated April 10, 1897, and is upon condition that the work be done that year. His deed to the plaintiff is dated September 9, 1899. There is no allegation of the time when the city entered upon the premises. If the entry was after the time limited it was not by virtue of any right conferred by the agreement. The agreement did not constitute an incumbrance when the deed was given, for the time allowed for an exercise of the right had then expired.

Judgment affirmed and cause remanded.

ELIZA E. ABBOTT v. JOHN D. SANDERS ET UX.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed June 5, 1907.

Mortgages—Deeds Conditioned for Support—Foreclosure—Sufficiency of Bill.

A conveyance conditioned for the support of the grantor will be treated as a mortgage, whatever the form in which the support is to be furnished, and upon breach by the grantee, equity may grant relief by foreclosing and extinguishing his rights under the conveyance.

A bill in equity to foreclose and extinguish defendant's rights in a conveyance to him by the oratrix conditioned for her support, which alleges persistent and aggravated abuse of the oratrix for the purpose of driving her from the premises, and discloses no fact that could afford any excuse or palliation, need not aver readiness to do equity, since, on the allegations, the rules of equity would afford no relief to defendant.

APPEAL IN CHANCERY, Addison County. Heard at Chambers, September 24, 1906, on demurrer to the bill. Decree, *pro forma*, that the demurrer be overruled, the bill adjudged sufficient and taken as confessed, and decree for the orator according to the prayer of the bill. The defendant appealed.

William H. Bliss for the orator.

The situation is the same as if the oratrix had given a deed and taken a mortgage back to secure the agreement for her support, and foreclosure is the proper remedy. *Moulton v. Ins. Co.*, 52 Vt. 123; *Ford v. Steele*, 54 Vt. 562; *Darling v. Robbins*, 60 Vt. 347; *Barnes v. Dow*, 59 Vt. 530; *Hoyt v. Hoyt*, 77 Vt. 244; V. S. §§970, 971.

Davis & Russell for the defendants.

The oratrix seeks to enforce a forfeiture, and this a court of equity never does. *Pomeroy*, Eq. §459; *Woolen Co. v. Newton*, 57 Vt. 451; *Copper Mining Co. v. Ormsby*, 47 Vt. 709; *Dunklee v. Adams*, 20 Vt. 423; *Birmingham v. Lessan*, 77 Me. 494; *Eaton*, Eq. 110.

MUNSON, J. The bill sets up a conveyance of real and personal property from the oratrix to the defendant husband, conditioned that the grantee support the oratrix during her life; alleges a substantial breach of the condition; and prays for a decree declaring the defendants' rights forfeited, and their title and equity extinguished and foreclosed. The bill is demurred to.

The defendants contend that the case presented is one of forfeiture by breach of a condition subsequent, and that forfeitures will not be enforced by a court of equity. It is held, however, with substantial unanimity, that equity will afford relief from conveyances given for support, on non-performance of the agreement to support; although there is great disagreement as to the grounds and form of the relief. 13 Cyc. 710; 2 Pom. Eq. Rem. §686 and notes; *Glocke v. Glocke*, 113 Wis. 303.

In many cases, in different jurisdictions, deeds given to secure the grantor's support have been annulled on general grounds of equity, without much attempt to refer the relief to any specific rule. *Peck v. Hoyt*, 39 Conn. 9; *Penfield v. Penfield*, 41 Conn. 474; *Jenkins v. Jenkins*, 3 T. B. Mon. 327; *Reeder v. Reeder*, 89 Ky. 529; *Patterson v. Patterson*, 81 Iowa 626; *Dodge v. Dodge*, 92 Mich. 109; *Rexford v. Schofield*, 101 Mich. 480; *Wilfong v. Johnson*, 41 W. Va. 283. In Illinois the court rescinds the transaction, presuming, if necessary to the relief, that the conveyance was obtained with fraudulent intent. *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; *Cooper v. Gum*, 152 Ill. 471. In Oregon it is considered that rescission is not permissible, and the grantor's support is secured by making it a charge upon the property. *Watson v. Smith*, 7 Ore. 448; *Patton v. Nixon*, 33 Ore. 159. In Rhode Island a reconveyance is decreed, upon the theory that the deed creates a continuing obligation in the nature of a trust, and that the failure to support is a renunciation of the trust. *Grant v. Bell*, 26 R. I. 288. In Indiana the agreement to support is considered a condition

subsequent, the breach of which entitles the grantor to re-enter and maintain a suit to quiet the title. *Richter v. Richter*, 111 Ind. 456; *Cree v. Sherfy*, 138 Ind. 354. In Wisconsin it was formerly considered that this ground of relief was not tenable, but this view is repudiated in the recent case of *Glocke v. Glocke*, 113 Wis. 303. It is said in that case that the property conveyed is held on condition subsequent; that upon a breach of the condition the title will revert, at the election of the grantor, without judicial aid; and that the grantor can have in equity "such appropriate relief as may be necessary to judicially establish his status as regards the property and quiet his title thereto."

The form that the equitable remedy will take in this State is determined by our holding regarding conditional deeds. With us, a conditional deed is treated as a mortgage to secure the grantee's performance of the condition contained in the deed. *Austin v. Downer*, 25 Vt. 558; *Ford v. Steele*, 54 Vt. 562; *Moulthrop v. Farmers Mu. Ins. Co.*, 52 Vt. 123. In the case last cited the holder of an insurance policy gave a deed of the insured property with a condition that if the grantee failed to pay him a certain sum as provided in the condition the deed should become null and void. The question was whether this avoided the insurance under the clause prohibiting alienation. The court could not see wherein this differed from the ordinary case of the conveyance of an absolute title with a mortgage back to secure a payment of purchase money, saying that here the defeasance was inserted in the deed of conveyance, while in the ordinary case of conveyance and mortgage the defeasance is inserted in the latter, but that in such a case both instruments are construed together as one and the same contract, effectuating the conveyance of a defeasible title to the purchaser. So the insured's deed was held an alienation of the property, avoiding the insurance.

The situation being the same as if the condition were omitted from the oratrix' deed and contained in another deed given back by the defendant husband, it is clear that the rights of the defendants may be foreclosed by bill. In this State, a conveyance conditioned for the support of the grantee is treated as a mortgage, whatever the form in which the support is to be furnished. *Austin v. Austin*, 9 Vt. 420; *Henry v. Tupper*, 29 Vt. 358; *Ottaquechee Sav. Bk. v. Holt*, 58 Vt. 166, 1 Atl. 485.

It appears from the bill that this deed was for an expressed consideration of three hundred dollars, and that the defendant husband paid some over that amount in discharge of a mortgage on the premises. There is no further allegation regarding this, and it is claimed that the bill is demurrable for want of an offer to do equity. The bill sets up a persistent and aggravated abuse of the oratrix, alleges that this was inflicted with intent to drive her from the premises, and discloses no fact or circumstance that can operate by way of excuse or palliation. The rules of equity do not permit any relief of the defendants on the case presented, and it was therefore unnecessary to aver a readiness to do equity.

Pro forma decree affirmed and cause remanded.

EDWARD P. LEE v. CURTIS C. FOLLENSBY AND CHARLES E. PECK.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed June 22, 1907.

Pleading—Oyer—Demurrer—Effect of Failure to Recite Instrument on Oyer—Trespass Quare Clausum—Justification—License of Cotenant.

Where an instrument is recited on *oyer* in a demurrer to a declaration making profert thereof, the instrument is treated as a part of the declaration and within the scope of the demurrer; but where, though *oyer* is asked and granted, the instrument is not so recited, but only passed up to the court, the facts contained therein are not within the scope of the demurrer, and will not be considered by the court.

Where a declaration charges trespasses committed on a specified date, and on divers other days and times between that date and the bringing of the suit, pleas professing to answer the whole declar-

ation, but relying only on deeds conferring rights that expired before the date of the writ, are bad on demurrer.

In a suit in trespass, where the declaration charges defendant with breaking and entering plaintiff's close, and then felling and removing trees and underbrush there growing, a plea justifying the breaking and entering as done under a license of plaintiff's cotenant is good, although without further allegation as to the scope of the license or the purpose of the entry, or touching the subsequent acts alleged in the declaration.

TRESPASS QUARE CLAUSUM. Pleas, the general issue, and special pleas justifying under a deed and license from plaintiff's cotenant. Heard on demurrers to said special pleas, at the December Term, 1906, Caledonia County, *Powers, J.*, presiding. Demurrers overruled and the several pleas adjudged sufficient. The plaintiff excepted. Cause passed to the Supreme Court before final judgment. The opinion states the substance of the pleas.

Dale, Amey & Hunt and *May & Hill* for the plaintiff.

A tenant in common of land cannot create an easement therein in favor of a stranger. Wash. Eas. & Serv. (4th ed.) 46; *Collins v. Prentice*, 15 Conn. 423; *Marshall v. Trumbull*, 28 Conn. 183; *Watkins v. Peck*, 13 N. H. 360; *Clark v. Parker*, 106 Mass. 557; *Bartlett v. Harlow*, 12 Mass. 348; *Varnum v. Abbott*, 12 Mass. 474; *Baker v. Whitney*, 3 Sumner 475; 1 Wash. on Real Prop. (6th ed.) §880; *Murray et al. v. Haverly et al.*, 70 Ill. 318; *Tipping et al. v. Robbins*, 64 Wis. 546; *Granger v. Postal Tel. Co.*, (S. C.) 50 S. E. 193; *Charleston etc. Co. v. Fleming*, 118 Ga. 699.

Though defendants were tenants in common with plaintiff, they would still be liable in trespass. *Booth v. Adams*, 11 Vt. 160; *McLellan v. Jenness*, 43 Vt. 188; *Wait v. Richardson*, 33 Vt. 190; *Freeman on Cotenancy*, §299; *Bennett v. Clemence et al.*, 6 Allen 18; *Silloway v. Brown*, 12 Allen 30; 17 Am. & Eng. Enc. (2nd ed.) 694; *Holly v. Hawley*, 39 Vt. 525.

Harland B. Howe and *Herbert W. Hovey* for the defendant.

The pleas justifying the entry under deeds from plaintiff's cotenant are good. *Holbrook v. Bowman*, 62 N. H. 313; *Ballou v. Hill*, 47 N. H. 347; *Rising v. Stannard*, 17 Mass. 282; *Brown v. Bailey*, 42 Mass. 254; *Badger v. Holmes*, 6 Gray 118; *Stevens v. Norfolk*, 46 Conn. 227; *Goodwin v. Keeney*, 49 Conn. 563; Freeman on Cotenancy and Partition, §253.

The breaking and entry is the gist of the action, and defendants need justify only that. Hence the pleas relying on a license of plaintiff's cotenant are good. *Hubbell v. Wheeler*, 2 Aiken 359; *Hathaway v. Rice*, 19 Vt. 102; *Grout v. Knapp*, 40 Vt. 163; *Goodrich v. Judevine*, 40 Vt. 190; *Warner v. Hoisington*, 42 Vt. 98; *Howard v. Black*, 42 Vt. 258; *Baker v. Wheeler*, 8 Wend. 505.

MUNSON, J. The declaration alleges the breaking and entering of the plaintiff's close, and the felling and removal of trees and underbrush there growing. The second and third pleas disclose a defence based upon deeds given by a cotenant of the plaintiff. The third and fourth pleas base the defence upon a license of the cotenant. The questions are raised by a general demurrer to these pleas.

The deeds are pleaded with profert. The plaintiff craves oyer of the deeds, and having heard them read demurs, but without reciting the deeds. Copies are furnished the Court on argument.

It is said in Gould's Pleading, Part II, §35, that the object of craving oyer is that the pleader may have an opportunity to recite the instrument, and thus avail himself, upon the face of the record, of anything in the writing which may aid him. It is said in Chitty's Pleading, p. 432, that if one pleading a deed and making profert omits to state any part of it which is material to the case of his opponent, the only way in which the latter can relieve himself is by praying oyer of the deed, and setting it out *in haec verba*.

The reasons for this requirement are obvious, and especially so when the issue is presented by demurrer. A demurrer submits to the court the legal effect of what appears upon the face of the preceding record. When the instrument is recited on oyer, it stands the same as if incorporated in the previous pleading where profert of it is made. If not recited, the facts contained in it are not within the scope of the demurrer. The

recital is also essential to a proper evidence of the issues determined, however the case may be presented. If the instrument is not recited, but merely handed up on argument, the case may be determined upon matters which are not contained in the record, but appear only from a loose paper, bearing no mark that connects it with the case, and which may easily fail of preservation in the files.

So the deeds are not before us, and the points depending upon their contents will not be considered.

The declaration alleges trespasses occurring on the 21st day of October, 1903, and on divers other days and times between that date and the bringing of the suit. The writ is dated August 31, 1906. It appears from the pleas that the rights conferred by the deeds, whatever they may have been, ended on the first day of April, 1906. So the trespasses occurring between that date and the commencement of the suit are not justified. These pleas profess to answer the whole declaration, but fail to do so, and are bad for this reason.

The fourth and fifth pleas justify the breaking and entering as done under a license of the cotenant, but without further allegation as to the scope of the license or the purpose of the entry, and without any allegation touching the subsequent acts alleged in the declaration. The only point made against the sufficiency of these pleas is that a parol license by one tenant in common cannot affect the rights of his cotenant. The question presented by this objection, applied to the pleas as framed, is simply whether one tenant in common can confer a right of entry without the consent of his cotenants. It is not essential to the determination of this question that the extent of a cotenant's separate authority in dealing with the property be definitely ascertained. A right of entry upon the premises may be for an occupancy which it would clearly be within the power of one cotenant to permit. So the fourth and fifth pleas are held sufficient.

Judgment reversed; demurrer sustained as to the second and third pleas, and said pleas adjudged insufficient; demurrer overruled as to the fourth and fifth pleas, and said pleas adjudged sufficient; and cause remanded.

IRENE MARIE MASSUCCO v. DOMINICO TOMASSI.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed August 6, 1907.

Breach of Promise to Marry—Pleading—Venue—County—Jurisdiction—Evidence—Defendant's Pecuniary Condition—Marriage—Best Evidence—Witnesses—Answers—Responsiveness—Admissibility—Harmless Error—Objections Not Raised Below—Motion to Set Aside Verdict—Overruling Pro Forma—Actions—Joinder—Motion in Arrest—Grounds—Several Counts—General Verdict.

The testimony of eyewitnesses to a marriage is better evidence thereof than the record authenticating it, as that may need further evidence to identify the parties.

The mere fact that the answer of a witness is not responsive does not make it inadmissible.

Where a party makes a motion addressed to the discretion of the court, he has a right to have the court exercise its judgment and discretion in disposing of it, hence it is error to deny such motion, *pro forma*.

A motion in arrest of judgment for that the counts in the declaration are not for the same cause of action, is not sustainable.

Where counts are for different causes of action, and some of them are bad, and the verdict general, with nothing to show on which counts the damages were assessed, a motion in arrest of judgment will lie.

Where a motion in arrest of judgment for that the counts in the declaration are not for the same cause of action, did not allege that any of the counts were bad, it did not present that question to the trial court, and therefore that question will not be considered by the Supreme Court in review.

In an action for breach of promise to marry, to meet defendant's claim that plaintiff refused to marry him, plaintiff was properly allowed to show that in answer to letters received by her in Italy

from defendant here, which she did not produce, they being still in Italy, and the terms of which she did not seek to establish, that she wrote to defendant, who, on notice to produce, denied having received such letters, that her father would not consent to their marriage; that he could write to her father, and, if he consented, everything would be all right.

In an action for breach of promise to marry, where defendant claimed that plaintiff refused to marry him, and plaintiff claimed that she wrote defendant that she would marry him, if her father consented, her testimony that, after leaving home because her father refused consent, her father sent word to her that, if she would return, he would consent, was harmless; it appearing that her father did subsequently consent.

In an action for breach of promise to marry, where the sole defence was no breach, and accord and satisfaction, any error in admitting testimony that defendant had promised a priest to marry plaintiff was harmless.

In an action for breach of promise to marry, where plaintiff, to show defendant's financial condition, introduced evidence of his declarations that he was worth from \$20,000 to \$30,000, some of which declarations having been made a considerable time before the promise to marry, it was error to restrict defendant's rebuttal testimony to the time of the promise.

In an action for breach of promise to marry, where plaintiff introduced evidence of defendant's declarations that he was worth from \$20,000 to \$30,000 when the promise was made in March, 1899, it was error to exclude defendant's evidence, offered in rebuttal, that in 1893 or 1894 the only property he and his then wife had was some real estate, of which she held the title, and some money; that in one of those years they leased a piece of land on which his wife built a store; that he bought goods with his money, amounting to between \$4,000 and \$5,000; that both the store and the goods were burned, without insurance; that, he owning no property and owing debts, they leased the property for a year or two; and that when they bought it, they had to mortgage it for \$5,500 for the purchase money.

Where an excepting party objected to the admission of evidence on a specified ground, he will be confined to that ground in the Supreme Court.

An exception to a certain instruction to the jury, on the ground that there was no evidence to sustain it, will not be considered where, though a transcript of the evidence is referred to by the bill of exceptions, the transcript furnished this Court recites only a part of the evidence.

In an action for breach of promise to marry, where the declaration relied upon a contract made in Italy, to be performed there, and which was broken there, a failure to allege a right of action under the law of Italy did not go to the jurisdiction of the subject-matter, but only to the sufficiency of the declaration; for, the cause of action declared upon being transitory, the court had power to judge concerning the general question involved, and that was jurisdiction of the subject-matter, irrespective of the sufficiency of the declaration, or the existence of a good cause of action.

In an action for breach of promise to marry, made in Italy, to be performed there, and which was broken there, the omission in the declaration to lay the action in the county where the suit was brought, under a *videlicet*, did not affect the court's jurisdiction to try the case; for in this State that fiction does not designate the county from which the jury is drawn, but the place of trial is determined by statute.

ASSUMPSIT for breach of promise to marry. Plea, the general issue, and notice. Trial by jury at the March Term, 1907, Washington County, *Miles*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. This case has been once before in the Supreme Court, see 78 Vt. 188.

A. M. Sartorelli, *George W. Wing* and *H. C. Shurtleff* for the defendant.

It was error to exclude defendant's evidence offered in rebuttal of plaintiff's evidence of defendant's declarations as to his financial condition. *Casey v. Gill*, 154 Mo. 184; *Sprague v. Craig*, 51 Ill. 288; *Wilbur v. Johnson*, 58 Mo. 600.

As the declaration alleges no right of action under the law of Italy for breach of the promise relied upon, and as the promise, place of performance, and the breach are laid in Italy, the declaration discloses no right of action. *Stout v. Wood*, 1

Blackford (Ind.) 71; *Cherry v. Thompson*, 7 Q. B. 573; *Sawyer v. No. Am. Life Ins. Co.*, 46 Vt. 704; *McLeod v. Conn. & Pass. River R. R.*, 58 Vt. 735; *Needham v. G. T. R. R.*, 38 Vt. 308; *Pickering v. Fisk*, 6 Vt. 112; *Judge of Probate v. Hubbard*, 44 Vt. 597; *Vaughn v. Congdon*, 56 Vt. 118; *LeForrest v. Tolman*, 117 Mass. 109; *Mahler v. N. Y. etc. Co.*, 35 N. Y. 352; *Stephens' Pl.* 306; *Hale v. Lawrence*, 21 N. J. L. 714; *Eingartner v. Ill. Steel Co.*, 94 Wis. 70.

But when in a transitory action, it becomes necessary or expedient, as matter of description or otherwise, to state where the contract was made, or the cause of action actually arose, and the place thus stated is out of the country in which the venue is laid, then it is necessary to lay the venue under a *videlicet*. *Duychinck v. Ins. Co.*, 3 Zab. (N. J. L.) 280; *Roberts v. Harmage*, Salk. 659; *Mastyn v. Fabrigas*, Cowp. 170.

Though the court will take judicial notice that the civil law is in force in Italy and is the basis of Italian jurisprudence, yet judicial notice will not be taken of the details of that law. *Banco de Sonora v. Banker's etc. Co.*, 95 N. W. (Iowa) 232; *Leach v. Pillsbury*, 15 N. H. 139.

Lord & Carleton and Hale K. Darling for the plaintiff.

Even had the defendant not contended that the plaintiff had refused to marry him, it would have been competent for the plaintiff to show that she had accepted defendant's proposal and that this acceptance was made known to him. *Weaver v. Bachert*, 2 Pa. St. 80, 44 Am. Dec. 159; *Adams v. Byerly*, 123 Ind. 368; *Green v. Spencer*, 3 Mo. 318, 26 Am. Dec. 672.

As bearing on the question of damages, it was proper for plaintiff to show her lack of pecuniary means. *Vanderpool v. Richardson*, 52 Mich. 336.

The injury to the plaintiff's health and feelings by reason of the defendant's breach of promise was proper to be shown on the question of damages. *Yale v. Curtiss*, 71 Hun. 436; *Reed v. Clark*, 47 Cal. 194; *Robinson v. Carver*, 88 Iowa 381; *Sherman v. Rawson*, 102 Mass. 395.

By pleading to the additional counts, the defendant has precluded himself from objecting that they are for different causes of action. *Luce v. Hoisington*, 56 Vt. 436; *Baker v. Sherman*, 73 Vt. 26.

Venue is that part of the writ indicating where the trial is to be had, and *venue* is necessary for no other purpose. *McKenna v. Fisk*, 1 How. 248; Gould's Pleadings, Ch. III, §§102, 103; Stephens' Pleadings, 280.

In the margin of the writ in the case at bar is the usual statement, "State of Vermont, Washington County, ss." As to the effect of thus laying the venue and of a variance between such venue and that in the body of the declaration, see 1 Chitty's Pl., 274; *Slate v. Post*, 9 Johns. 81; *Sharp v. Sharp*, 3 Wend. 280; *Alder v. Griner*, 13 Johns. 449. The venue in the margin of this writ ought to be given due force, in view of the fact that under our practice the writ and declaration are part of the same instrument, and one can be referred to in aid of the other. *Church v. Westminster*, 45 Vt. 380; *Moultrop's Admr. v. School Dist.*, 59 Vt. 381.

The omission of a venue is but matter of form and the only way to take advantage of it is by special demurrer. *Bodwell v. Parsons*, 10 East. 359; *Briggs v. Bank*, 5 Mass. 94.

ROWELL, C. J. The original declaration contains but one count, which alleges with time but not with place, that the defendant promised to marry the plaintiff. It then alleges that at such another time, at such a place in Italy, for the purpose of deceiving the plaintiff, the defendant had the marriage ceremony performed by a priest in a Roman Catholic church, which was not a legal marriage, as the defendant well knew, and that he then and there promised to have a civil marriage performed; and afterwards, at divers times, changed the time and place of having said marriage performed; at one time promising to have it performed at Boston; at another, at Montpelier; and finally, at such another time, but stating no place, he refused to have it performed at all, and married another woman.

Several new counts were filed. Some laid the whole cause of action in Italy; some, part of it there and part of it in New York; and some, all of it at Montpelier, where the parties lived when suit was brought. The case was tried on all the counts.

The defendant admitted that he promised to marry the plaintiff, and said that he was ready and willing, and repeatedly offered, to marry her, but that she would not marry him. To meet this claimed refusal, it was competent for her to show,

as she did, that in reply to letters received by her in Italy from the defendant here, which she did not produce, they being still in Italy, and the terms of which she did not seek to establish,—she wrote to the defendant, who, on notice to produce, denied having received such a letter, that her father would not consent to their marriage; that he could write to her father, and if he consented, everything would be all right. It appeared that her father did subsequently consent.

The plaintiff left home when her father refused to consent, and would not go back. Her testimony that while thus away her father sent word to her that if she would come back he would consent, was harmless, as it appeared that he did subsequently consent.

It appeared that a religious marriage ceremony was performed in Italy between the parties, and that such a ceremony did not make a legal marriage there. The objection that the performance of that ceremony could not be shown by parol, for that the best evidence of it would be some writing that authenticated it, is not well taken. It does not appear that there is any such writing, nor that any such was required; and if it did, it would not preclude the testimony of eye witnesses, as is abundantly shown by the cases. Indeed the testimony of such witnesses is regarded as better evidence than the record, as further evidence of the identity of the parties may be necessary. 2 Wig. Ev. §1336; 3 Wig. Ev. §2088.

In testifying to what took place at the religious ceremony the plaintiff said, among other things, that the priest made the defendant swear to marry her by civil marriage as soon as they arrived here, because he had promised many times before to marry her then. The defendant moved to strike out this last statement; and on being asked if that was what the priest said, the interpreter said it was a statement of what the defendant had previously said. It is now urged that the statement was not responsive, was prejudicial, and could have been regarded by the jury only as evidence that this promise had before that been frequently made to the priest. That the statement was not responsive did not make it inadmissible. *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488. And whether the statement was of a promise to the priest or to the plaintiff, it was harmless; for the defence was put solely on the ground of no breach by the defendant, and accord and satisfaction.

To show the financial condition of the defendant at the time of the promise in March, 1899, the plaintiff introduced evidence of his declarations to the effect that he was worth from twenty to thirty thousand dollars. It does not appear how far back of the promise these declarations went, but it is fair to presume that some of them went back a considerable time, for a sister of the plaintiff's testified that he talked with her about his property "lots of times" before he went to Italy to marry the plaintiff, which was the March of the promise, and that he always said he was worth about twenty-five thousand dollars. The plaintiff also introduced evidence tending to show that at the time of the promise the defendant owned a block in Montpelier worth from ten to fifteen thousand dollars. The purchase price of the block was conceded to be six thousand dollars. The deed of it, dated Nov. 29, 1897, was taken to the defendant's former wife, a sister of the plaintiff, who died in 1898.

As bearing on his actual financial condition at the time of the promise, and also on whether he made the claimed declarations as to his property, the defendant offered to show that he had to mortgage the block for \$5,500 of the purchase money. This was objected to as immaterial and excluded, and the defendant confined to the time of the promise, and not allowed to go back of it to show his financial condition at that time. This was error. The plaintiff was asserting and the defendant was denying, and it cannot be said that the condition he offered to show he was in when he bought the block did not tend to rebut the plaintiff's evidence as to the condition he was in fifteen months later when he made the promise, for it tended to lessen the probability that in that short time, with his facilities, he had come to be worth from twenty to thirty thousand dollars. Indeed the plaintiff does not now claim that the offered testimony was immaterial, but seeks to justify its exclusion only on the ground of remoteness in time. But that objection was not made below, and therefore cannot be made here. The testimony should also have been received as bearing on whether or not the defendant made the claimed declarations as to his property; for if he was in the financial condition he offered to show, he would be less likely to be saying what was claimed, as it would have been untrue.

As further tending to show his financial condition at the time of the promise, the defendant offered to show that in 1893

or 1894 the only property he and his wife had was some real estate in Bellows Falls, of which his wife held the title, and some money that he had; that in one of those years they went to Berlin Falls, N. H., and leased a piece of land on which his wife built a store; that he bought goods with his money to the amount of between four and five thousand dollars, and stocked the store for the purpose of carrying on a fruit and grocery business; that before the store was fairly finished and the business in it fairly begun, both the store and the goods were destroyed by fire and entirely lost, as they were not insured; that then they went to Montpelier, at which time he had no property, and owed debts for some of the property destroyed; that they leased the Montpelier property for a year or two, and when they bought it they had no money to pay for it, and had to mortgage it for \$5,500 of the purchase money.

This was objected to, for that the loss of the Berlin Falls property had no tendency to show that the defendant was not the owner of property five years later, and excluded. This was also error, for the same reason first given that made the exclusion of the other offer error. And here, also, the objection made below is abandoned, and only remoteness of time urged, which was not objected below.

As further tending to show his financial condition at the time of the promise, the defendant offered to show that his wife willed the Montpelier property to him on condition that he should, for the benefit of the children, clear the Bellows Falls property from a three thousand dollar mortgage she put upon it for money that she put into the Montpelier property, and should pay the balance of the incumbrance on the Montpelier property; otherwise, that it should be differently disposed of. This was excluded, but on what ground does not appear. The exclusion is now sought to be justified on the ground that an attested copy of the will itself would have been the proper evidence of its contents; and, for aught that appears, that may have been the ground of exclusion, for counsel, in making the offer, said they should have to call the defendant "to show the will," the contents of which could not, of course, be shown in that way.

It does not appear whether or not the defendant offered to show his financial condition at the time of the promise otherwise than as above stated.

The court charged that the wealth and condition in life of the parties should be considered in determining how much, if any, the plaintiff would have been elevated in her social relations on account of the defendant's property. The defendant excepted to this, for that there was no evidence of any loss in that respect. It is enough to say of this exception that it does not appear whether there was any such evidence or not; for although a transcript of the testimony is referred to by the bill of exceptions, a transcript of only a part is furnished. It is objected that there is no sufficient allegation of loss of social position, and that no recovery could be had therefor without proof of a law in Italy allowing it. But as these objections were not made below, they are not considered.

It was error to overrule *pro forma* the motion to set aside the verdict as against the weight of evidence and as excessive. The motion was addressed to the discretion of the court on both grounds, and the defendant had a right to have the court consider it, and exercise its judgment and discretion in disposing of it. *Ranney v. St. Johnsbury & Lake Champlain R. R. Co.*, 67 Vt. 594, 601, 32 Atl. 810; *State v. Newell*, 71 Vt. 476, 45 Atl. 1045.

The defendant moved in arrest, for that the counts are not all for the same cause of action; and for that the original declaration gives no jurisdiction, while the new counts amend into jurisdiction, if any is thereby conferred. But the motion is not sustainable merely because the counts are not all for the same cause of action; for it is not only permissible but desirable that all causes of action on different contracts between the same parties that can be joined in one action should be joined, for if separate actions thereon are pending in a court at the same time, the court may restrict costs. V. S. 1680. When counts are for different causes of action and some of them bad and the verdict general, with nothing to show on what counts the damages were assessed, you may move in arrest, as was done in *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813. But here the motion does not allege that any of the counts are bad, and hence it did not present that question to the court below, and therefore it will not be considered here on this branch of the motion.

As to the jurisdictional branch of the motion the argument is, that the original declaration discloses no cause of action, as it sets up a contract made in Italy, to be performed in Italy, and broken in Italy, but alleges no right of action under the laws of Italy, and that therefore there was no subject-matter over which the court could acquire jurisdiction, as you can not amend into jurisdiction. But this does not go to the jurisdiction of the subject-matter, but only to the sufficiency of the declaration; for the cause of action as originally declared upon being transitory, the court had power to judge concerning the general question involved, and *that* was jurisdiction of the subject-matter, irrespective of the sufficiency of the declaration or the existence of a good cause of action. *Perry v. Morse*, 57 Vt. 509; *Hunt v. Hunt*, 72 N. Y. 217; *St. Louis etc. Railway Co. v. Lowder*, 138 Mo. 533, 60 Am. St. Rep. 565; *North Pacific Cycle Co. v. Thomas*, 26 Oregon 381, 46 Am. St. Rep. 636. The omission in the original declaration to lay the action in Washington county under a *videlicet*, does not affect the jurisdiction of the court to try the case, for in this State that fiction does not designate the county from which the jury is to come, as it did at the common law, but the place of trial is determined by the statute. We hold in this regard as they do in Massachusetts under a similar statute. *Briggs v. Nantucket Bank*, 5 Mass. 94; *Gay v. Horner*, 13 Pick. 535.

The question of jurisdiction being the only one presented below by this branch of the motion, no other is considered thereunder. The motion to dismiss for want of jurisdiction, filed in this Court, is sufficiently disposed of by what has already been said.

The claim that the court erred in not ruling that the case should be tried by the law of Italy is not considered, for the question is not presented by the exceptions.

Reversed and remanded.

STEPHEN S. PLACE v. THE GRAND TRUNK RAILWAY COMPANY.

February Term, 1907.

Present: ROWELL, C. J., MUNSON, and WATSON, JJ., and HALL, SUPERIOR J.

Opinion filed August 9, 1907.

Master and Servant—Injuries to Servant—Contributory Negligence—Assumption of Risk—Question for Jury—Proximate Cause—Duty to Charge—Evidence—Opinion—Experts.

In an action for injuries to a servant, where the evidence fairly tends to show negligence on defendant's part, and there is room for opposing inferences in respect of plaintiff's contributory negligence, both questions should be submitted to the jury.

Although a servant assumes the risks ordinarily incident to the business in which he is engaged, he does not assume an extraordinary risk existing through the fault of his employer, unless he actually or presumably comprehended it.

In an action for injuries to a railroad employee, resulting from the collision of a switch engine with cars standing near the car on which plaintiff was employed, as he was attempting to descend therefrom, evidence considered, and *held* to require that the questions of negligence, contributory negligence, and assumption of risk be submitted to the jury.

Whether a witness is qualified to testify as an expert is a preliminary question of fact to be determined by the trial court, and its decision thereon is not revisable where there is evidence tending to support it.

In an action for injuries to a railroad employee as he was attempting to descend from a car, caused by a collision which he claimed resulted from a defective split switch, an expert was properly allowed to testify as to the effect on a train if it ran over a split switch where the point of the rail was bent away from its fellow, and to state that either the train would be derailed or take the wrong track.

In an action for injuries to a railroad employee, resulting from the collision of a switch engine with cars standing near the car on

which plaintiff was employed, as he was attempting to descend therefrom, the evidence presented issues as to whether the injuries were caused by the negligence of the hostler in charge of the engine, or was due to a defective switch, and whether defendant was negligent in entrusting the engine to said hostler, or in failing to equip the switch with a lock, or in allowing it to become out of repair. The court charged that plaintiff could not recover if the accident was caused solely by the negligence of the hostler, and that the burden was on plaintiff to prove that defendant was negligent in failing to furnish plaintiff a safe place wherein to work, and that plaintiff was free from contributory negligence. *Held*, that it was error to refuse to instruct the jury as to the meaning of proximate and remote cause, and to fail to authorize them to find that the absence of a lock on the switch was the remote, and not the proximate cause of the accident.

In contemplation of law, negligence is the proximate cause of only the natural and probable consequence thereof, in the sense that a prudent man ought to have foreseen it; and whether the result complained of in a given case is such natural and probable consequence of the defendant's negligence is a question of fact for the jury, unless it is plain enough to be ruled as matter of law.

CASE for negligence. Plea, the general issue. Trial by jury at the October Term, 1906, Essex County, *Tyler, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

L. L. Hight and *Harry B. Amey* for the defendant.

It was error to refuse to instruct the jury as to the meaning of proximate and remote cause. A person is responsible for only the natural and probable consequence of his acts, or such consequence as may be foreseen by a prudent man. *Beach*, Neg. §31; *McDonald v. Snelling*, 14 Allen 295; *Pollard v. M. C. R. R. Co.*, 87 Me. 51; 1 *Thomp. Neg.* §57.

Herbert W. Blake for the plaintiff.

The decision of the trial court as to the qualifications of an expert witness is not revisable, if there was any evidence to

sustain it. *Bemis v. R. R.*, 58 Vt. 636; *Wright v. Williams*, 47 Vt. 222; *Dale v. Johnson*, 50 N. H. 452; *Carpenter v. Corinth*, 58 Vt. 214; *Lewis v. Crane & Sons*, 78 Vt. 216; *Morrisette v. Railroad Co.*, 76 Vt. 273; *McGovern v. Hays & Smith*, 75 Vt. 104.

Although the burden is on plaintiff to prove that he exercised due care, he need not give affirmative evidence of that fact. It is enough that the circumstances justify that inference. *Quimby v. Central Vt. R. R.*, 23 Vt. 387; *Hill v. New Haven*, 37 Vt. 501; *Lazelle v. Newfane*, 69 Vt. 306; *Boyden v. R. R. Co.*, 72 Vt. 91; *LaFlam v. Missisquoi Pulp Co.*, 74 Vt. 136; *Thomp. Neg.* §4630.

On a motion by defendant for a directed verdict, the evidence must be viewed in the light most favorable to plaintiff. *Kilpatrick v. R. R. Co.*, 72 Vt. 263; *Worthington v. Cent. Vt. R. R.*, 64 Vt. 107.

Where the injury complained of results from the combined negligence of defendant and a fellow servant, plaintiff may prevail. *Hunn v. Mich. Cent.*, 41 A. & E. R. C. 452; *G. T. R. Co. v. Cummings*, 106 U. S. 700; *C. & N. W. R. Co. v. Sweet*, 45 Ill. 197; *Felton v. Harbison*, 104 Fed. 737.

HALL, Superior J. The plaintiff at some time prior to the accident in question had worked for the defendant shoveling snow ten and one-half days, and at another time three or four days; this was all the experience he had in railroading; he had usually been employed in a mill or as a laborer.

On the 26th of January, 1906, he was employed by the defendant and worked shoveling coal, most of the time, from cars into the coal chute, until February 2, when he was ordered to go with one Boin to shovel part of a car of coal into the boiler house; he had been there for that purpose once before. The coal chute and boiler house were about 125 feet apart in the same yard. In that part of the yard there were six tracks and four switches: No. 1—the northerly track or siding—led on a curve to the boiler house; Nos. 2, 3 and 4 led to an ash pit between the coal chute and boiler house; No. 5 led to the side of the coal chute where engines were coaled, and No. 6—the southerly track—up an inclined plane to where coal cars were unloaded into the chute.

Between the main tracks and tracks Nos. 1 and 2 there were three switches, numbered 1, 2 and 3 respectively; the distance from 1 to 2 was about 152 feet; from 2 to 3, 98 feet; 60 feet from No. 3 was located split switch No. 4 controlling the entrance upon tracks 1 and 2. Nearly opposite and about 10 feet from it was split switch No. 5 controlling the entrance upon tracks 3 and 4; the targets upon these switches were upon the northerly side.

The distance from split switch No. 4 to the foot of the incline, leading up to the coal chute, was about 40 or 50 feet; engines did not run up the incline; cars of coal were drawn up by means of a cable and there was only a narrow space on either side of the cars when on the trestle. It appeared that coal cars were about 35 feet long; that the platform was about 3 feet from the ground, and that the sides and ends were about 3 feet above the platform or floor of the car. On either end was a platform about 12 inches wide. The usual method of getting onto a car was by stepping on the brake-beam or upon a plank placed on the brake-beam, taking hold of the brake-rod and climbing up on the end of the car; the plaintiff's evidence tended to show that it was the only way to get on.

Track No. 1 was not only used for drawing coal to the boiler house, but as a storage track for cars of coal, and on the day of the accident there was part of a car of coal on the south side of the boiler house that had been there a day or two, and, easterly, and three or four feet from it, were five cars loaded with coal, some of which had been placed there that morning about 8 o'clock and before plaintiff and Boin arrived; the space between the car opposite the boiler house and the next one easterly was left so that the men could pass through and get into the door on the east end of the boiler house.

On the morning of the accident, about 8:30 plaintiff and Boin went to the boiler house, as directed, to unload the car that was partly full, standing beside the boiler house; they went through the space between the cars, through the east door, and opened the windows into which the coal was to be shoveled; they then returned to the car and got up over the end as they had done at the coal chute; Boin shoveled from the east end and plaintiff from the west end; it took about two hours to unload the car; when unloaded Boin got down over the east end, plaintiff went to the east end, and set down his pick and

shovel and got over on to the narrow platform (about 12 inches wide) on the end of the car; he then took out his pick and shovel and threw them on the ground and took hold of the brake handle, a little south of the center of the car, with his right hand; and the handle (grab iron) near the corner of the car (plaintiff testified that it was on the end of the car) with the other hand, facing towards the west, and attempted to get off on the south side; he put his right foot upon the draw bar so as to throw his body forward and enable him to reach the brake-beam with his left foot; the brake-beam was about one and one-half feet down, or half way to the ground, and 8 or 10 inches under the car; while in this position the collision hereinafter described occurred and plaintiff was caught; his right foot and leg were injured, necessitating amputation between the ankle and knee, and his left foot was injured, necessitating the amputation of part of the foot.

Plaintiff testified that he did not see any stirrup and did not know that there was one on the car; that he did not know that the draw-bar was constructed with a covered spring that let it back when the couplers came together; that he did not know what the dead wood was, and had never received any instructions or been cautioned to look out for danger; that he never saw any cars put on the boiler track and did not know there was any danger.

White, plaintiff's foreman, who directed him and Boin to go and unload the car, was on the engine at the time of the collision; he testified that he knew plaintiff and Boin were unloading the car and had seen them one or two minutes before, that if it was a dangerous place he would look after them, but he did not see any danger at the time and did not think it would happen.

The engine causing the collision was in charge of one Boulett, engine hostler for defendant, who was backing up from a point on track No. 5, intending to run the engine on track No. 2 to the ash pit to have its fires cleaned. He was on the south side, looking down towards the hind end and did not look to see how the switch target stood—"forgot it," he testified—and did not know where he was going until he was about three feet from the easterly car on the boiler house track; he then reversed the engine, but that did not prevent the collision which

caught plaintiff; when the engine stopped it was a little more than its length west of switch No. 4.

The yard foreman, who had worked for defendant about fourteen years and set the cars in on the boiler house track that morning, testified that he set switch No. 4 for the ash pit track when they came out. The evidence of the plaintiff tended to show that the employees of the defendant, who had a right to change the switch, had not done so between the time when the cars were placed there, and the switch set for the ash pit, and the time of the accident.

The switch was what is known as a Ramapo, and the defendant's evidence tended to show that it was as good as any made; there had been a lock on that switch until about eighteen months before, when it was discontinued; locks were used on some of the switches in the yard and had been in constant use by the defendant; it appeared that there was nothing impracticable in using a lock on that switch; plaintiff claimed that it might have been changed by a stranger, not employed by the defendant, and that it was negligence to leave it without a lock.

Witness Gleason testified that the day following the accident, or the next day after, he saw the switchmen with a split switch rail out near the foot of the incline that had a bent point.

Witness Dealand, an employee of the defendant, who did all kinds of work in the yard, testified that some time in February—he could not say whether before or after the accident—he worked on the switches and there was a point bent on one where the split switches were together. The plaintiff's evidence tended to show that the bent end of a split switch rail at No. 4, if set for the ash pit, might throw the engine onto the boiler house track.

Boulett had worked for the defendant nine years, the last five as engine hostler, and his work was perfectly satisfactory to his superiors, who regarded him qualified for his position, but he had never been examined nor furnished with a copy of defendant's rules, which provided, among other things, that enginemen "are required to observe the position of all switches and must know (so far as it is possible for them to do so) that such switches are right before passing over them"; also that "they must always keep a sharp lookout ahead, noting carefully the position of switches, semaphores and other signals, and also look back frequently to see that the train is intact."

He had seen the rules and been instructed to some extent by a former hostler. He had been quite deaf since he was thirteen, and his hearing was growing no better; he had never been examined.

Mr. Cobb, locomotive foreman for defendant, who examined engineers and firemen for defendant, testified that such examination covered, among other things, seeing, hearing and writing; that this was done for the protection of the public and fellow workmen.

The plaintiff's evidence tended to show that in passing over a switch there was a peculiar sound called a "click," and claimed that if Boulett failed to look at the target and could have heard this "click," it would have indicated to him the danger and prompted quicker action and avoided the collision.

Boulett testified that he knew he was on the switch, but that it was the first time the switch had been turned and the first time anything had happened; he had several engines in charge, daily, to clean and coal and was frequently on the tracks in the yard, but only occasionally upon the boiler house track.

The defendant contends that the court below erred in overruling the motion for a verdict, in admitting certain evidence of witness Kilpatrick, and in failing to give instructions to the jury relative to proximate and remote causes of the accident.

I. The motion for a verdict was based upon three grounds. *First*: that the plaintiff failed to establish negligence on the part of the defendant; *second*: that the plaintiff failed to show that he was free from contributory negligence, and *third*: that if plaintiff was free from negligence, the injury complained of was the result of a risk which he assumed.

1. The law is well settled in this State that if the evidence fairly tends to show negligence on the part of the defendant, that question must be submitted to the jury. Redfield, C. J., in *Barber v. Essex*, 27 Vt., p. 70, says: "Questions of negligence, where the law has settled no rule of diligence, can never be determined as matter of law—except where the testimony is all one way." *Palmer v. Village of St. Albans*, 56 Vt. 519. Numerous cases might be cited.

2. The law is equally well settled that if there are opposing inferences to be drawn from the evidence bearing upon the question of contributory negligence, as there clearly were in this

case, that question must be submitted to the jury. *Latremouville v. B. & M. R. R. Co.*, 63 Vt. 336, 22 Atl. 656; *Boyden v. Fitch. R. R. Co.*, 72 Vt. 91, 47 Atl. 409; *LaFlam v. Miss. Pulp Co.*, 74 Vt. 136, 52 Atl. 526; *Morrisette v. C. P. R. Co.*, 74 Vt. 232, 52 Atl. 520, and cases cited in the opinions.

3. While it is the settled law of this State that an employee assumes the risks ordinarily incident to the business in which he is engaged, he does not assume an extraordinary risk, existing by the fault of his employer, unless he knows and comprehends it, or it was so plainly observable that he will be taken to have known and comprehended it. *Dunbar v. Central Vt. Ry. Co.*, 79 Vt. 474, 65 Atl. 528, and cases there cited. The evidence in this case tends to show that this was not a risk assumed by the plaintiff, and the question was therefore one for the jury. *LaFlam v. Miss. Pulp Co.*, *supra*.

From a careful study of all the evidence, we are satisfied that, when considered in the light of the circumstances shown by the record, it was the duty of the court below to submit the case to the jury upon all the questions raised by the motion and that there was no error in so doing. *Gila. Valley, G. & N. Ry. Co.*, plaintiff in error, v. *Lyon*, 27 Sup. Ct. 145, opinion by Mr. Justice Peckham, filed Dec. 10, 1906; *Lily v. N. Y. Cen. & H. R. R. Co.*, 107 N. Y. 566, and cases cited in the opinions.

II. One of the grounds of negligence complained of by plaintiff was that switch No. 4 was out of repair by reason of defendant's negligently permitting a split rail with a bent point, to remain in said switch, and that by reason thereof the engine ran in on track No. 1, causing the accident.

The record shows that witness Kilpatrick was asked by the plaintiff's attorney:

"Q. In your experience, if a split switch, if one of these rails got bent in that manner away from its fellow, so that although the switch standard was right and an engine coming along, would it take the track that the switch was shut against, from your actual experience in the yard?"

"Plaintiff doesn't claim there is any difference in railroad-ing in that particular now."

"(Court)—The burden would be upon the plaintiff to show that it is the same, in relation to what you call a split switch and nothing else."

Question admitted and exception allowed defendant.

"A. It would either go off on the ground or go off on the other track."

When a question in issue involves special knowledge or skill and the opinion of a witness is asked, the trial court is the sole judge of the witness's qualifications to answer, if there is any evidence tending to show that he has knowledge or skill in respect of the matter under consideration.

In *Bemis v. Cen. Vt. Ry. Co.*, 58 Vt. page 641, 3 Atl. 534, Veazey, J., in applying the well recognized law upon the subject, says: "This is a question of fact, the decision of which by the trial court, as an inference from evidence is not revisable," and cites several authorities.

If the evidence was not before us we should assume that the finding was upon evidence, properly admitted, but the evidence is before us, and it fully justified the court in permitting the witness to give his opinion from his experience, and there was no error in the ruling of the court in that respect.

III. This Court recognizes and applies the maxim *causa proxima, non remota spectatur* in cases calling for its application.

Rowell, J., in *Gleason v. Del. & Hud. Canal Co.*, 65 Vt. 213, on page 216, 26 Atl. 70, says: "It is the maxim of the law that the immediate, not the remote cause of an event is regarded. In the application of this maxim, the law rejects, as not constituting ground for action, damages not flowing proximately from the act complained of."

Among other requests to the court to charge the jury, defendant made the following: "7. That if the jury find that the absence of a lock upon the switch-stand was negligence of the defendant, still this negligence was a cause remote, and not proximate; and the proximate cause was the negligence of the hostler in failing to observe the position of the switch, and this negligence, the proximate cause, being that of a fellow-servant, the plaintiff cannot recover."

The only exception taken to the refusal of the court to charge as requested was a general one and is not now urged, therefore we are not called to pass upon the soundness, in law, of this request.

At the close of the charge, the following special exception was noted: "The defendant also excepted to the failure or omission of the court in its charge to the jury to explain the

distinction between 'proximate' and 'remote' cause, and give the jury an opportunity to find, if they saw fit, that the absence of a lock on the switch was a remote cause, not a proximate cause, of the accident."

If this was a case requiring the court to define proximate and remote causes and to apply the maxim of *causa proxima, non remota spectatur*, the court's attention was called to the subject both by the request and the exception, and it should have been done.

The defendant does not rely upon any exception to what the court said in the charge, but in considering the question as to whether the court erred in respect of the matter embraced in the last exception, it is necessary to consider what the court did say to the jury, and the way and manner in which the various issues were presented to the jury.

Among other instructions we find the following:

"In order that the plaintiff should recover a verdict at your hands, the law casts upon him the burden of showing you, proving to you, by a fair balance of the evidence in his favor that the defendant was guilty of negligence in respect to furnishing him with a safe place to work; and furthermore, that his own negligence did not contribute to the happening of the accident."

After referring to the negligence of the engine hostler as that of a co-servant, the court said:

"Now, if that was the whole negligence that you find in the case, the defendant is not liable in this action, and the plaintiff is not entitled to recover."

Later in the charge, referring to the negligence of the engine hostler, coupled with other negligence charged, the court instructed the jury that: "If you find on the other hand that the negligence of the engineer combined with the negligence—or other negligence which is claimed by plaintiff, or either, happened to cause the accident, then you may find the defendant is liable, provided you find another element in the case in favor of the plaintiff to which I will call your attention."

The "other element" referred to was that of contributory negligence, and the court, after defining it and stating that the burden was upon the plaintiff to show that he was free from contributory negligence, said: "The law is, as counsel have

told you, if the plaintiff who asks to recover is guilty of any negligence on his part, he is not entitled to recover.”

From these excerpts from the charge, covering all that the court said relating to this particular subject, it will be seen that the court neither defined nor attempted to apply the maxim contended for by the defendant, but rather treated the negligence charged against the defendant, if found, as combining or concurring with the negligence of the engine hostler in causing the accident.

In returning a verdict of guilty, under the charge of the court, the jury must have found that the plaintiff was not guilty of contributory negligence.

In addition to the conceded negligence of Boulett, they must also have found that the accident was caused by the negligence of the defendant in entrusting the engine to Boulett, or in leaving a split rail in the switch with a bent point (if defendant did so leave it) or in allowing the switch to remain unlocked. Negligence on the part of the defendant in respect of one or more of these alleged acts or neglects, under the charge of the court, must have been found concurring with the negligence of the engine hostler, or the jury would not have returned a verdict against the defendant.

Upon the facts, just as they were presented on trial, was it the duty of the court to define and apply the rule as to direct or proximate and remote causes?

No question was made but what switch No. 4, controlling the entrance to track No. 1, where the accident occurred, was without a lock and had been for over a year. This must have been prominent in the minds of the jurors. If the failure to lock the switch had any part in causing the accident, can it be said to have been the proximate cause or a concurring cause so closely connected with the negligence of the engine hostler, in causal relation, that in legal effect it was proximate?

The defendant's counsel, in argument, admits, and all authorities agree that no general definition will apply to all cases.

Pierpont, J., in *Stickney v. Maidstone*, 30 Vt. 738, says on p. 741: “The extent to which the first and proximate cause shall be said to operate, so as to procure direct and immediate results, must depend upon the peculiar circumstances of each particular case. It would be extremely difficult to lay down

any rule defining the precise line that divides the proximate from the remote cause, which would operate justly in all cases."

Webster defines proximate cause as "a cause which immediately precedes and causes the effect, as distinguished from the remote, mediate or predisposing cause," but this is, perhaps, too general for legal application.

Bouvier gives as one of the definitions, "the cause nearest in causation without any efficient concurring cause to produce the result may be considered the direct cause." It is often defined as "that which stands next in causal relation."

Mr. Justice Strong, in *M. & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, says that "the primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement."

Rowell, J., in *Morrisette v. Canadian Pacific R. R. Co.*, 74 Vt. 232, on pp. 242 and 243, discussing the subject of actionable negligence and proximate cause, says: "Its proximity has no necessary connection with continuity of space nor nearness of time, but only with that of which the result is the natural and probable consequence in the sense that a prudent man ought to have foreseen it. Hence in this class of cases the defendant's negligence is the proximate cause of the natural and probable consequences of it, and whether the result complained of in the concrete case is the natural and probable consequence of it, is a question for the jury, unless it is plain enough to be ruled as matter of law."

Munson, J., in *Corbin v. Grand Trunk Ry. Co.*, 78 Vt. 458, on pp. 461 and 462, 63 Atl. 138, says: "Generally, in cases of this class, the test of actionable negligence is whether the injury which followed the act or omission in question was a natural and probable consequence in the sense that a prudent man ought to have foreseen it."

These propositions are fully sustained by Cooley on Torts, p. 73; Beach on Contributory Negligence, §31; Thompson on Negligence, §57, and are not questioned.

If the unlocked switch had any part in causing the accident, under the circumstances of this case, it cannot be said as matter of law that it was the proximate cause; neither can it be said as matter of law that the defendant could have foreseen that

such an accident as the one shown by the record, would have resulted as the natural and probable consequence of the unlocked switch at No. 4.

If these propositions are sound, it follows that the questions should have been submitted to the jury, under proper instructions, which necessarily required the defining of proximate and remote causes.

The failure of the court to do so may have been prejudicial to the defendant. In any event, it had the right to have the matter passed upon by the jury under proper instructions.

We therefore hold that the court erred in not giving such instructions as the case fairly called for, upon this point, and that the last exception is well taken.

Judgment reversed and cause remanded.

WILLIAM H. SMITH v. CENTRAL VERMONT RAILWAY COMPANY.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed August 10, 1907.

Railroads—Fires—Action for Damages—Evidence—Defects in Engines—Photographs—Admissibility—Sufficiency of Evidence—Charge—Nonconformity to Pleading.

The ruling of the trial court on the question of remoteness of offered evidence is not, ordinarily, revisable.

In an action against a railway company for damages caused by a fire started by sparks from its locomotives, it was not error to allow plaintiff's witness to testify that 14 months after the fire, at a place pointed out to him as being where it started, and where the evidence tended to show that it did start, were embers, remains of burned woods, and bushes; the evidence tending to show the origin of the fire being all circumstantial.

The rule that where, in an action against a railway company for damages caused by a fire started by sparks from its locomotives, the fire is shown to have resulted from sparks emitted by a locomotive specifically identified, the evidence as to defective locomotives should be confined to that one, does not apply where neither of the four locomotives that passed the place where the fire originated within a few hours before it was discovered was specifically identified; and defendant's offer made to plaintiff's attorney before trial, to point out "each engine that passed there on that day," was not an offer to point out the locomotive that emitted the sparks.

It was proper to allow plaintiff to testify that three days after the fire, and not more than two minutes after one of defendant's locomotives passed the burnt district, emitting cinders, he saw a fire in the grass on defendant's right of way, as tending to show such a tendency of defendant's locomotives passing over the line to emit sparks as to render it probable that one of them caused the fire in question.

In an action against a railway company for damages caused by fire set by sparks from its locomotives, as tending to show the direction of the wind and the dryness of the surface of the ground, plaintiff was properly allowed to testify that three days after the fire he found partly burned shingles from 600 feet to nearly one-quarter of a mile beyond his burned buildings, though he did not know where they came from, except by hearsay; it being otherwise shown that burning shingles were blown in that direction at the time of the fire, and that fire was in fact carried there by the wind.

Photographs may be verified and used in evidence in the same manner as maps or other diagrams.

In an action against a railway company for setting fires by sparks from its locomotives, photographs showing the appearance and situation of the burnt district, and the combustible material on defendant's right of way were admissible, though the photographer did not testify, and no one in terms testified to their accuracy, but there being testimony tending to show that appearances were fairly represented thereby.

Defendant having introduced expert testimony to show that the screens used on its locomotives both before and since the fire

were the same and of good quality, plaintiff was properly allowed, in rebuttal, to put in evidence a piece of partly burned coal and to testify that he found it since the trial began, on the snow near where the fire was supposed to have started, within two feet of defendant's right of way fence, 18 or 19 feet higher than, and 41 feet from the track.

Where the declaration charged a railway company with negligence in allowing combustible material to accumulate on its right of way, the setting fire thereto by sparks from its locomotives, and negligence in allowing the fire to spread to plaintiff's damage, it was not essential to a recovery that plaintiff should show any negligent defect in the locomotive, or negligence in its management, nor that the igniting sparks came from any particular locomotive.

In an action against a railroad company for setting fires by sparks from its locomotives, evidence considered and *held* sufficient to show that the fire was started by sparks from one of defendant's locomotives.

Since every count in the declaration alleges that the fire was set by sparks from defendant's locomotives, it was error to instruct the jury that, if the fire started in combustible material that defendant negligently allowed to accumulate on its right of way, plaintiff could recover, "Whether the fire was set by some other person or by defendant's engines," although there was no evidence that the fire was "set by some other person."

CASE for negligence. Plea, the general issue. Trial by jury at the December Term, 1906, Orange County, *Waterman, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

C. W. Witters and *C. S. Palmer* for the defendant.

It was error to admit the testimony of the witness Flint as to the appearance of the burnt district 14 months after the fire, as tending to show its origin. That was allowing the jury to guess as to defendant's liability. This class of evidence is restricted to cases where there is no direct evidence that the fire was set by sparks from defendant's locomotives, and where plaintiff does not know, and cannot ascertain from defendant's

records which of its locomotives passed the place shortly before the fire, and defendant claims that the sparks could not reach plaintiff's property. *Hoskinson v. Central Vermont R. Co.*, 66 Vt. 618; *Ross v. Boston etc. R. Co.*, 6 Allen 87; *Menominee River etc. Co. v. Milwaukee etc. R. Co.*, 91 Wis. 447.

Where the fire is shown to have been caused, or in the nature of the case could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to that engine; and testimony tending to prove negligence in management of or defects in other engines of the defendant is irrelevant and inadmissible. *Henry v. So. Pac. R. Co.*, 50 Cal. 176; *Hopeton etc. Bank v. L. E. etc. R. Co.*, 174 Ill. 36; *Ireland v. Cincinnati etc. R. Co.*, 79 Mich. 163; *Haseltine v. Concord R. Co.*, 64 N. H. 545; *Gibbons v. Wis. Valley R. Co.*, 58 Wis. 335; *Jacksonville etc. R. Co. v. P. L. etc. Co.*, 49 Am. & Eng. R. Cas. 603.

The refusal to compel plaintiff to make his election, and the allowing him to introduce general testimony as to defendant's other engines, must have prejudiced defendant's case before the jury, and was wholly unwarranted. *Nelson v. Chicago etc. R. Co.*, 35 Minn. 170.

It is not negligence *per se* for a railroad company to permit grass or other combustible material to grow or accumulate on its right of way. *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252; *Chicago etc. R. Co. v. Goyette*, 133 Ill. 21; *Taylor v. Pennsylvania etc. R. Co.*, 174 Pa. St. 171; *Texas etc. R. Co. v. Medaris*, 64 Tex. 92; *Chicago etc. Co. v. Burger*, 124 Ind. 275; *Ohio etc. Co. v. Shaufelt*, 47 Ill. 479; *Pittsburg etc. Co. v. Nelson*, 51 Ind. 150; *Ill. Cent. R. Co. v. Frazier*, 47 Ill. 504; *Tribette v. Ill. Cent. R. Co.*, 71 Miss. 212.

March M. Wilson, John J. Wilson and R. M. Harvey for the plaintiff.

The plaintiff was entitled to a verdict and judgment on the undisputed evidence in the case on the grounds set forth in the third count without any reference to the other two counts. Every material fact, necessary to sustain a judgment on this count, is in the case, standing on competent and uncontradicted evidence. To recover under this count it was not necessary to

show any defect in the defendant's engines. *Smith v. London etc. Co.*, L. R. 5 C. P. 98; *Richmond v. Medley*, 7 Am. & Eng. R. Cas. 495; *Grand Trunk v. Richardson*, 91 U. S. 454; *Webb v. Rome*, 10 Am. Rep. 389.

It was proper to admit plaintiff's testimony that three days after the fire in question, defendant's engine set another fire in the same vicinity. *Richmond v. McNeill*, 10 Am. & Eng. R. Cas. 691; *Dunning v. Maine Cen.*, 91 Me. 87; *Gorham Mfg. Co. v. N. Y. etc. Co.*, 60 Atl. 638; *Shelley v. Philadelphia R. R. Co.*, 60 Atl. 581.

WATSON, J. The plaintiff seeks to recover damages for loss of buildings and contents by fire alleged to have been started on the defendant's right of way by sparks emitted from its locomotive engines, April 1, 1905. A certified transcript of the entire case is made a part of the bill of exceptions, and is to control.

The plaintiff's evidence tended to show that on the day above named a fire was started in the dry grass, weeds, and brush on defendant's right of way about one-half of a mile north of the railroad station at Bethel; that the land was very dry and the wind blowing toward the southeast; that the fire burned from the railroad right of way onto the land of William G. Shaw, and from his land the sparks and fire were carried to his barn, setting fire to it, and from Shaw's burning barn to the buildings of the plaintiff, which with their contents were destroyed. Without objection the plaintiff introduced evidence tending to show that about that time cinders flew every day from trains being operated on that part of defendant's road; that immediately after the fire a large quantity of coal cinders were found on defendant's land in the locality where the fire started, some of them very near an inch long and half an inch wide, and that like cinders were found also in the adjoining field, ten or twelve feet from the fence.

R. I. Flint, a civil engineer, and witness called by the plaintiff, testified to certain measurements made by him in June of the next year, and to making a plan which was used as an exhibit in the case; that he was shown a point and told it was where the fire started. Evidence was introduced later in the trial tending to show that the fire did in fact start there. Subject to exception, the witness was permitted to testify that in

the locality pointed out "were embers, remains of burned woods and bushes and cinders," and that by "cinders" he meant "particles of partly burned coal" which he carefully examined. It was essential to the plaintiff's case to show the origin of the fire as alleged. The evidence bearing thereon was all circumstantial. The appearance of the surface where the fire started with reference to combustible matter partly burned and cinders such as were described by the witness, was relevant evidence upon that issue. The question of remoteness in time was a preliminary one, determined by the trial court, and nothing appears to take it out of the ordinary rule excluding revision.

The plaintiff testified that three days after the fire in question he went over the burned district, on which occasion when near the place where the fire started he saw "the 2:30 passenger train" going north; that "cinders flew out and dropped along," and that after the train passed "there was a little fire in the grass." He was then allowed to testify, against defendant's objection, that he saw this fire not more than two minutes after the train passed; that it was between the track and the fence, and burned through under the fence, about two hundred feet north of where he was standing, as tending to show the dryness of the surface, the character, habit, propensity, and poor condition of defendant's locomotives, and that the cinders which escaped from them would set fire to combustible material. It is urged that this was error, since (1) the defendant offered to point out to the plaintiff, and to give a history of, each engine which passed that point on the day of the fire in question, and to give him an opportunity to inspect the same, but the plaintiff neglected to avail himself thereof; and (2) the evidence related to another engine and subsequent to the fire in question. There was no evidence that this was the same engine.

The doctrine first invoked under this exception is that where the injury complained of is shown to have been caused by sparks from an engine which is specifically known and identified, the evidence should be confined to that engine. Hereon it appears that on May 2, 1905, defendant's attorney wrote a letter to plaintiff's attorney offering to point out to him each engine which passed the place of the beginning of the fire causing the loss on the day it occurred, and to give him an opportunity to examine it, and that a history of the character of the netting and spark arresters in each would be given him if he

so wished. In reply thereto by letter the day following the plaintiff's attorney said, "I will communicate to those interested what you say about inspecting engines. Do you mind giving me number and name of engine which passed north about 12:30 (noon) on day of fire?" The record does not show any reply to this letter; indeed, in discussing before the court below the matter of admitting the two letters in evidence, it was stated by plaintiff's counsel without contradiction that no reply was made. Nor does it appear that any engines were thus pointed out or inspection had.

The evidence does not show the number of trains that passed over the road on the day in question, but it appears that there were four or more within a few hours previous to the time when the fire was discovered. According to some of the evidence a train passed about 12 o'clock, noon, and smoke was seen coming from the locality of the setting out of the fire within less than fifteen minutes thereafter. Other evidence tended to show that the fire was discovered shortly after the passing of the freight train going north, which left Bethel at 12:30 o'clock. It is not claimed that any of the engines hauling the four or more trains passing within the few hours previous to the discovery of the fire were specifically known and identified. And the effect of an offer to point out the offending engine we need not consider, for no such offer was made. As before seen, it was to point out "each engine that passed there on that day." Whatever may be said regarding the soundness of the modified rule contended for, when applicable, surely the record before us does not present a case that comes within it. In Pennsylvania it is held that where the injury complained of is shown to have been caused, or in the nature of the case could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Yet in *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461, 27 Am. St. Rep. 652, where the evidence showed that four engines drawing trains had passed within an hour before the discovery of the fire, three of them being unknown and unidentified, and the one to which the fire was attributable not definitely ascertained, it was held competent for the plaintiff to prove that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, and kindled numer-

ous fires upon that part of the road, to sustain or strengthen the inference that the fire originated from the cause alleged. In *Hoskinson v. Central Vt. R. Co.*, 66 Vt. 618, 30 Atl. 24, it was impossible for the plaintiff to furnish any proof as to the particular engine which he claimed had caused the loss. It was held that under those circumstances the plaintiff was properly allowed to introduce evidence as to any of defendant's engines which had been in use upon the line within a reasonable time before the alleged fire. In *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 357, defendant's railroad bridge first took fire, from which the fire was carried to the plaintiff's mill. The plaintiff's testimony tended to show that the fire originated from the locomotive of one of two known trains, but the particular engines drawing those trains were not identified. One assignment of error was, that the plaintiffs were allowed to prove, under objection, that at various times during the summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair or management, to those claimed to have caused the fire. It was held that the crossing the bridge by defendant's engines not long before it took fire raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and that this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage.

The precise question raised by the second ground of the exception does not appear to have been passed upon in this State. As just seen, the question presented in the *Hoskinson* case had reference to other engines before the injury complained of. So in *Clevelands v. Grand Trunk Ry. Co.*, 42 Vt. 449, where the evidence received was, "that on or about the time of the fire in question, the engines in use by the defendants, running past the plaintiff's mills, generally and habitually scattered fire from the ash-pans and smoke-stacks," the times to which the evidence related were all before the fire occurred. There the defendants had a large number of engines which they used indiscriminately over that part of the road. The evidence was held to have been properly admitted, since the inference would

be from it, in connection with evidence tending to show that engines which so scattered fire as that it kindles along the roadside, are not of proper construction and suitable repair, that the fire in question was caused by one of those defective engines. In *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461, 27 Am. St. Rep. 652, it was held that evidence of this character should be confined to the negligent operation of the engines at or about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to render the proof practicable. In *Field v. N. Y. Central R. R. Co.*, 32 N. Y. 339, subject to exception, a witness was allowed to testify that he had frequently seen live coals on the track, "before and since" the fire; that it was a very common thing. The testimony was held to have a bearing on the question of the cause of the fire, and properly admitted. Evidence of the same character regarding other engines both before and after the occurrence in controversy, was held legitimate for the same purpose in *Gowen v. Glaser*, (Pa.) 3 Cent. Reporter, 109; *Campbell v. Missouri Pacific Ry. Co.*, 121 Mo. 340, 42 Am. St. Rep. 530; *Alabama & V. Ry. Co. v. Aetna Ins. Co.*, (Miss.) 35 So. 304; *Koontz v. O. R. & N. Co.*, 20 Ore. 3. And in *Matthews v. Missouri Pacific Ry. Co.*, 142 Mo. 645, evidence relating wholly to another engine subsequent to the fire causing the damage was held properly received.

Although there is not a unanimity of decision on the question, we think it may be said from the weight of authority that this kind of evidence is admissible as tending to show such a capacity or tendency in the class of engines passing over the line to emit sparks as to be evidence tending to prove the possibility, and a consequent probability, that the fire in question was caused by one of defendant's engines. And we see no good reason for any difference in the tendency of such evidence whether it relates to other engines within a reasonable time before, or within a reasonable time after, the occurrence of which complaint is made.

For the purpose of showing the force and direction of the wind, also the dryness of the surface of the ground, at the time of the fire, the plaintiff was allowed to testify, subject to exception, that on the third day after the fire he found shingles partly burned in Marsh's pasture, some on what is called the "Ed Armour place," and some back of Mr. Preston's house.

This house is in the vicinity of six hundred feet southeast of where Shaw's buildings were burned. The other places named are farther in the same direction, the farthest being nearly one-quarter of a mile. The admission of this evidence was not error. Nor was there error in overruling defendant's motion to strike out the testimony thus given because the witness testified in cross-examination that he did not know where the partly burned shingles came from, except as others told him. It was otherwise shown that burning brands and shingles were carried in that direction at the time of the fire, and that fire was in fact carried there by the wind which was blowing toward the southeast.

Exception was taken to the admission of four photographs in evidence, as showing the appearance and situation of the ground burned over, the combustible material on defendant's right of way, and the remains of such material on that territory. They were objected to as incompetent, and that no proper foundation had been laid for their introduction. True, the person by whom the photographs were taken was not called, as a witness, and no one in terms testified to their accuracy. Several witnesses, however, gave evidence tending to show that the appearances in the respects named were fairly represented therein. One witness testified to being present right away after the fire when some of them were taken. Photographs may be proved and used in evidence in the same manner as maps or other diagrams. It cannot be said that they were improperly admitted. *Archer v. N. Y., N. H. & H. R. R. Co.*, 106 N. Y. 589; *People v. Jackson*, 111 N. Y. 362; *Alberti v. N. Y., L. E. & W. R. R. Co.*, 118 N. Y. 77.

The defendant introduced expert evidence tending to show the good quality and capacity of the screens of netting used on its engines; that its engines generally were in the same state of repair before as after the fire; and that the same system of screening was still in use by it. In rebuttal the plaintiff testified that since the trial began he had noticed pieces of partly burned coal near the point where the fire was supposed to have originated, along on the snow within a foot and a half or two feet of the fence of defendant's right of way, 18 or 19 feet higher up than the track, and about 41 feet from the rail. One of the pieces of coal thus found was introduced as an exhibit subject to exception on the ground that it was incompetent and

immaterial, as tending to impeach the judgment of defendant's experts as to the quality and capacity of the screens used. We think it may fairly be inferred that these pieces of partly burned coal were thrown out by some passing locomotive. The evidence was therefore relevant for the purpose for which it was received. "It was like evidence of an experiment made use of to show that something did in fact happen" which had a tendency to lessen the credibility of the testimony given by defendant's expert witnesses. A partial dissimilarity of conditions bears more upon the weight of such evidence than on its admissibility. *Hoskinson v. Central Vt. R. Co.*, 66 Vt. 618, 30 Atl. 24; *State v. Flint*, 60 Vt. 304, 14 Atl. 178. What we have said in an earlier paragraph touching remoteness is equally applicable here.

Exception was saved to the overruling of the motion that plaintiff be required to specify and elect which train he complains of, and in respect to the management of which train he charges the defendant with negligence. The third count charges negligence in suffering and permitting combustible material to gather, accumulate, etc., on defendant's right of way; the setting fire thereto by sparks from its engines, and negligence in allowing the fire to spread, etc. It is not necessary to a right of recovery under this count that any negligence in the construction or management of the engines be proved. Nor that the igniting spark or sparks be shown to have come from any particular one of defendant's engines. *Smith v. London and South Western Ry. Co.*, L. R. 6 C. P. 14, 18 Eng. Rul. Cas. 726; *O'Neill v. N. Y., O. & W. R. Co.*, 115 N. Y. 579; *Delaware etc. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214. It follows that the motion was properly overruled.

The defendant excepted to the overruling of its motion for a verdict, at the close of the evidence, on the grounds (1) that no competent evidence had been introduced tending to show that the fire which destroyed the plaintiff's property originated with any engine operated by the defendant; and (2) that there was no proof that any fire set out by defendant's engines continued or extended to and was the proximate cause of the destruction of the plaintiff's property. But there was no error in this ruling. The evidence tends to show negligence by the defendant in permitting dry weeds, dry grass, and brush to accumulate and remain on its right of way in the locality where the

evidence tends to show the fire in question started, whence it spread to and consumed the plaintiff's property. It is not necessary here to discuss in detail the evidence of the origin of the fire. Suffice it that under our holdings on the questions already discussed, the record shows considerable evidence tending to show that the fire was set out by sparks from one of defendant's locomotives. No contention is made but that if the fire thus originated and was continuous, without the intervention of any new and independent cause, and consumed the plaintiff's property, it was the proximate cause of the injury.

In a supplemental charge to which exception was taken, the jury were instructed in substance that if the fire originated in combustible material which was negligently allowed to accumulate along defendant's right of way, and spread therefrom until it destroyed the plaintiff's property, then the plaintiff would be entitled to recover, no matter how the fire got into the combustible material, "whether set by some other person, or by the defendant's engines," defective or not defective.

Every count of the declaration alleges in effect that the fire was set by live sparks and fire from defendant's engines. There is no allegation that it originated in any other way. There was no evidence tending to show that it was "set by some other person." The charge permitted the plaintiff to recover, even though the fire was set by a trespasser,—a basis of fact outside of the scope of the declaration, and outside of the evidence in the case. This was error.

Judgment reversed and cause remanded.

WILLIAM TUDOR v. GEORGE TUDOR.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed August 10, 1907.

Deeds—Fraudulent Conveyances—V. S. 4965—Wills—Effect of Probate—Relation Back to Testator's Death—Executors Authorized by Will to Sell Real Estate—Scope and Nature of Such Power.

Though no title can be founded on a deed that is absolutely void, a deed that is voidable only may convey a perfect title.

The words "null and void," in V. S. 4965, providing that fraudulent and deceitful conveyances made to avoid a right, debt, or duty of another person shall, as against him, his heirs, executors, administrators, and assigns be "null and void," are construed to mean voidable only; and, therefore, such conveyances vest the legal title in the grantee, subject only to be divested by the creditors of the grantor, if they chose to impeach it.

Though a conveyance was, as between the parties, within V. S. 4965 providing that all fraudulent conveyances shall be "null and void," the fraudulent grantee having conveyed the property to a third person, who was not made a party to a suit in chancery by the vendor's creditors to subject the land to their claims, he was not bound by a decree in favor of the orators.

Where a will authorized and empowered the executors thereof to sell the real estate of which the testator should die seized, such executors, upon the probate of the will, became donees of a common law power, independent of their functions as executors, by which they could vest the title to such real estate in a purchaser; and the source of that power is not the probate court, but the testator who created the power.

A conveyance of land in this State by such executors under a foreign will, before probate here, is a defective execution of the power; but a subsequent probate here relates back and cures the defect.

TRESPASS for cutting timber. Plea, the general issue. Trial by court at the September Term, 1903, Windham County, *Start*, J., presiding. Judgment, *pro forma*, for the defendant. The plaintiff excepted only to the judgment. The opinion fully states the case.

Batchelder & Bates for the plaintiff.

The power of the executors to sell was devised to them independently of their functions as executors, and a purchaser may deal with them as he would with any other vendor. *In Re Pearson*, 98 Cal. 603; *Hartwell v. Foster*, 102 Ga. 38.

Clarke C. Fitts for the defendant.

By the terms of the statute, Underwood got no title as against Eaton, and having no title, could convey none to Smith. The principle of equity which qualifies the absolute nullity of such fraudulent conveyance is that innocent parties ought not to suffer. But it being at law absolutely null and void, the burden is upon him who in equity claims to be an innocent purchaser for value. *Campbell v. Whitson*, 18 Am. Rep. 553; *Young v. Lathrop*, 12 Am. Rep. 603; *Tanbury v. Robinson*, 82 Am. Dec. 244, and notes; *Williams v. Merle*, 25 Am. Dec. 605, n.; 20 Cyc. 648; *Foster v. Foster et al.*, 56 Vt. 540.

The will was duly "published and allowed" in Vermont, but it does not appear that the executors ever qualified in this State. The will gave the executors only a power of sale, not an interest in the land. *Croswell, Executors & Admr.*, §330; *Brown v. Edson*, 23 Vt. 435; *Ferre v. Society*, 53 Vt. 162.

WATSON, J. The action is trespass *quare clausum fregit* for cutting timber on Lot No. 1, in the 9th range of lands in the town of Stratton.

Both parties claim title from Richard Perry, who conveyed the lot to Henry Z. Payne, March 1, 1865, by deed recorded. Payne conveyed to William W. Underwood by warranty deed dated July 21, 1866, and recorded. Underwood conveyed to Lucius Smith by warranty deed dated May 15, 1867, and recorded the 8th day of January following. Smith

conveyed to Samuel Bassett and Lot Bassett by warranty deed dated March 20, 1873, recorded July 9, of the same year.

At the September term in 1870, of Windham County Court, a judgment was recovered by certain creditors against Payne, for twenty-five hundred dollars damages and costs. Execution was issued thereon, and levy was made November 17, 1870, on the land in question; due proceedings were thereupon had and the land set off to the execution creditors.

These creditors brought their bill to clear the title, under the levy, from the cloud of the fraudulent conveyance, to the court of chancery in that county at the September term of 1872, against Payne and Underwood, containing allegations showing the above mentioned conveyance from Payne to Underwood to have been fraudulent as to said creditors, and that the grantee participated in the fraud; also showing the judgment, execution, levy upon the land, and set off, as above stated; praying that Underwood be compelled to convey said land to the orators and be perpetually enjoined from conveying the same to any one else, and from asserting any right or title thereto. At that term of court the bill was taken as confessed against Payne, and at the following term, in April, 1873, upon hearing against Underwood, he having appeared and made answer, a decree was rendered against him in accordance with the prayer of the bill.

It is under the set off on the execution, and this decree in chancery, that the defendant claims title.

The deed from Underwood to Lucius Smith purports to have been for a valuable consideration, and included other lands. Smith was not made a party to the suit in chancery, and there is no finding as to whether, when he took his deed, he did or did not have notice that the conveyance to his grantor was in fraud of the rights of creditors.

The statute then in force, as now, provides that all fraudulent and deceitful conveyances of lands, etc., made or had to avoid any right, debt, or duty of any other person, shall, as against the party or parties only whose right, debt, or duty is attempted to be avoided, their heirs, executors, administrators, or assigns, be null and void. It is argued that by the terms of the statute Underwood had no title as against the execution creditors, and having no title could convey none to Smith; also that since the statute declares a conveyance in fraud of the

rights of creditors null and void, it is incumbent upon a party claiming to be an innocent purchaser for value to establish it.

True it is this statute uses the words "null and void," yet in construction they are given the sense of voidable merely. Such conveyances are good as between the parties, also as against the grantor. *Carpenter v. McClure*, 39 Vt. 9. In stating the distinction between a thing void and one voidable, Bacon says: "A thing is void which was done against law at the very time of the doing it, and no person is bound by such act; but a thing is only voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done." Again, "of a void act or deed every stranger may take advantage, but not of a voidable one." Bac. Abr. Tit. Void and Voidable.

In *Anderson v. Roberts*, 18 Johns. 515, the construction of the statute of New York, a transcript, substantially, from the 13th of Eliz. ch. 5, in which such fraudulent conveyances are declared to be "utterly void," was under consideration. Recognizing the above passage from Bacon as showing the true distinction, it is said that whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore in a legal sense, not utterly void, but merely voidable. It was held that the fraudulent grantee takes the entire interest of the fraudulent grantor, and that the deed is voidable at the instance of the creditor, not legally and strictly void. The same question has been considered at length by the court of last resort in Maine, and the same conclusion reached. *Andrews v. Marshall*, 43 Me. 272. To the same effect are the decisions in Massachusetts. *Harvey v. Varney*, 98 Mass. 120; *Freeland v. Freeland*, 102 Mass. 477.

The State of Wisconsin has a statute to the effect that a money judgment, when docketed as provided by law, shall, for a period of ten years from the date of the rendition thereof, be a lien on the real property of the judgment debtor, except his homestead, in the county where the same is docketed. In *French Lumbering Co. v. Theriault*, 107 Wis. 627, 81 Am. St. Rep. 856, one question was whether any lien was created by a judgment, properly docketed in the county where real estate is located which the judgment debtor previously owned but before such docketing conveyed to another, if the conveyance

was void under the provisions of the statute of that state, whereby every conveyance or assignment of any estate or interest in lands made with intent to hinder, delay, or defraud creditors, etc., "shall be void." It was contended that the word "void" as there used meant "absolutely void"; that as regarded the judgment creditor the title to the property attempted to be conveyed remained unaffected by the attempt; and that accordingly the judgment attached to and became a lien thereon. It was held that the term "void" in the statute means "voidable" only, and that a judgment against a fraudulent vendor of real property, docketed as specified by law, does not of itself create a lien on such property, because the conveyance vests in the fraudulent vendee the title of his vendor subject to the right of the defrauded creditors at their election to avoid it.

By a statute in this State passed in 1843, general assignments by debtors for the benefit of creditors, "shall be null and void" as against creditors. Yet it was held that by the term "void" nothing more was intended than inoperative, or voidable. *Merrill v. Englesby*, 28 Vt. 150.

It follows that the conveyance from Payne to Underwood was not void but only voidable, and that thereby the legal title vested in the latter, subject to be divested by creditors of the grantor if they saw fit to call it in question. Its validity was not assailed by them until after the fraudulent grantee had conveyed the property to Smith who was not made a party to the execution creditors' suit in chancery and hence whether chargeable with notice of the fraud or not, he was not affected by the decree. Smith's title passed to his grantees, and the plaintiff here may stand upon it. It is a principle of law that nothing can be founded upon a deed absolutely void, yet from those voidable only perfect rights or titles may flow. *Somes v. Brewer*, 2 Pick. 184; *Crocker v. Bellangee*, 6 Wis. 645, 70 Am. Dec. 489.

Lot Bassett, one of the grantees in the plaintiff's chain of title, died prior to 1889, testate. At the time of his death he was a resident of the State of Massachusetts. Prior to the 23rd day of July, 1889, his will was duly probated in that State. Elisha Bassett, Wm. O. Bassett, and John N. Bassett were named as executors in the will, and they were authorized by the will to sell all of the real estate of the deceased wherever situated. The executors qualified in Massachusetts before the

day last named. On that day they, by their deed properly executed, conveyed the property here in question, of which the testator died seized, to the plaintiff and one George S. Town. Two months later the deed was recorded. In March, 1897, the will was duly published and allowed as the last will and testament of Lot Bassett in the probate court for the District of Marlboro in this State, the district in which the land in dispute is situated; but it does not appear that the executors named therein were qualified in this State. The defendant contends that since the will gave the executors only a naked power of sale, it was essential to the exercise of the power upon realty in this State that they qualify here.

Under the devise to sell, the executors had a common law authority by which they could vest the legal estate in a purchaser, and the purchasers under that power took the estate from the testator by whom the power was created,—not from the power itself,—in the same manner as if the power and the instrument executing the power, had been incorporated in one instrument. Co. Litt. 113a; 4 Kent's Com. 337; *Duke of Marlborough v. Godolphin*, 2 Vesey, Sen. 61, 21 Eng. Rul. Cas. 397; *Cook v. Duckenfield*, 2 Atk. 562; *Doe d. Wigan v. Jones*, 10 B. & C. 459; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Conklin v. Egerton's Admr.*, 21 Wend. 430; *Pratt v. Rice*, 7 Cush. 209. This same principle is recognized in *Ferre v. American Board of Comrs.*, 53 Vt. 162.

The fact that the land in controversy is situated in another state than that of the primary jurisdiction makes no difference in this respect, since by admitting the foreign will to probate in this State it had the same effect as if originally proved and allowed by the same court. Questions involving local creditors or the expenses of ancillary administration do not arise. When the will was allowed, filed and recorded in the probate court in the district in which the real estate is situated, it was sufficient to operate upon the property (V. S. 2365-2369), notwithstanding letters testamentary had been granted only in the primary jurisdiction. The source of the executors' authority under the power was the same,—not from the probate court, but from the owner of the estate who created the power.

In *Newton v. Bronson*, 13 N. Y. 587, the action was brought against the defendant as executor of a will to compel specific

performance of a contract alleged to have been made by him as such executor, through his attorneys, for the sale and conveyance of lands situate in the State of Illinois. The testator died in the city of New York, owning the land in question, and his will was duly proved before the surrogate of the city and county of New York. The defendant and one other were named in the will as executors but the defendant alone qualified and assumed to act. The testator by his will authorized and empowered the executors named therein, or such of them as should qualify and assume its execution, to contract for the sale of, and to grant, bargain, sell, and convey, etc., all or any part of the real estate whereof he should die seized. It was argued that the defendant's office of executor did not extend to the lands in Illinois, upon the principle that letters testamentary and of administration have no force beyond the jurisdiction in which they are granted, hence that he could not effectually perform the judgment of the court, not being able, as was insisted, to affect the title to land outside the state of the principal administration. It was held that he was the donee of a power at common law and under the statute; that although it was, by the will, made a condition to his acting under the power that he should qualify as executor, when he had performed that condition, he acted in conveying the land as the devisee of a power created by the owner of the estate, and not under an authority conferred by the surrogate; and that the plaintiff was entitled to specific performance of the contract.

In *Crusoe v. Butler*, 36 Miss. 150, the testator was a resident of the State of Alabama and died there, having at the time of his death title to land in the State of Mississippi, which was the land in controversy. The will was probated in the state of the domicile and the executor named in the will there qualified. Later, but not until after the conveyance of the land by the executor, an authenticated copy of the probate of the will in the primary jurisdiction was admitted to probate and recorded in the proper court in the county and state where the land was situated. The will devised to the executors therein named or the survivor of them full power and authority, whenever they thought expedient, to bargain, sell, and convey all and any of the testator's real estate, wherever the same might be situate, for the purposes specified.

One material question before the court was, whether it was necessary that letters testamentary should be granted to the executor in the state of the situs of the land upon admitting the will to record there. It was insisted that as no such letters were granted there, the executor was never invested with the authority to exercise the power to convey the lands conferred upon him by the will, hence that his deed was void. It was held that the will granted a power not appertaining to the subject-matter of administration—a trust committed by the testator to the persons who should become his executors. That in such a case the executor derives his authority from the will, and not from letters testamentary; that while it was true that his character and capacity as executor must be established by proof of the will yet when the will was probated there, and it was shown that he had taken upon himself the office of executor, the power to sell the land, which was independent of his appropriate functions as executor, became vested; that the only necessity for the grant of letters was to fix the person who was to execute the power granted by the will; and since that had been done by the proper court of the testator's domicile, it was unnecessary to obtain letters in the state where the land was situated. The same doctrine was laid down in *Apperson's Est. v. Bolton*, 29 Ark. 418, and in *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503.

Our statute provides that no will shall pass either real or personal estate, unless it is proved and allowed in the probate court, or by appeal in the county or Supreme Court. V. S. 2356. In the case before us, as before seen, the conveyance of the land by the executors was before the probate of the will in this State. This was a defective execution of the power, but as the estate passed by force of the will, the subsequent probate here related back and gave effect to the prior conveyance. *Ex parte Fuller*, 2 Story 327; *Crusoe v. Butler*, 36 Miss. 150; *Babcock v. Collins*, above cited.

The plaintiff therefore has a good title to the land in dispute, and upon the facts found he is entitled to recover.

Pro forma judgment reversed, and judgment for the plaintiff to recover the sum of one hundred fifty dollars damages with interest since September, 1903, and costs.

SERENA K. CHURCH'S EXECUTOR v. WHITCOMB H. CHURCH'S
ESTATE.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed August 10, 1907.

*Bills and Notes—Proof of Indorsement and Ownership—Wills
—Bequests—Proof of Acceptance—Presumption—Result of
Acceptance—Executors and Administrators—Possession of
Assets—Statute of Limitation—Estoppel to Rely on Statute.*

In special assumpsit on a promissory note against its maker's estate, where the note purports to have been indorsed by its deceased payee to claimant's testatrix, it is error to receive the note in evidence, without proof that the indorsement was made by the payee, or by his authority.

In general assumpsit, in the common counts, against a decedent's estate, brought by the executor of decedent's wife's will, based on notes executed by decedent to his wife's father, and claimed by said executor to have passed to him under her will, the finding that by her will she gave to her husband for life all the income of her property, including the interest accruing on said notes during that period, included, by necessary implication, the further finding that those notes were a part of her property.

Prima facie, every gift, whether by will or otherwise, is supposed to be beneficial to the donee, and he is presumed to assent thereto, though he may be ignorant of the transaction.

Where a testatrix bequeathed to her husband for life all interest on certain notes held by her against him, and the residue of her property, consisting of certain articles, to J. to be disposed of by her as directed by a letter, evidence that, after testatrix's death, J. showed the letter to the husband, whereupon he delivered to her the articles named in the letter to be disposed of as therein directed, together with the letter, was admissible to show that he elected to take under the will.

One who accepts a devise or bequest, whether granted in lieu of a right or as a mere bounty, is bound to conform to the will and to accord full effect to all its provisions.

Where a wife bequeathed to her husband for life the interest on certain notes held by her against him, the notes are not collectible by her executor during the husband's life; but such executor is entitled to the possession thereof during that period.

Where a decedent accepted the provisions of his wife's will, which gave him for life the interest on certain notes held by her against him, since the notes were not collectible by the wife's executor during the husband's life, the operation of the Statute of Limitations was suspended during that period.

APPEAL from the disallowance by the commissioners of certain notes presented against the estate of Whitcomb H. Church by William P. Benton, as executor of the last will and testament of Serena K. Church. Trial by court at the December Term, 1906, Windsor County, *Taylor, J.*, presiding. Judgment for the claimant for the amount of the notes in question with interest thereon from the death of Whitcomb H. Church. The opinion gives the pleadings and fully states the case. This case has been once before in the Supreme Court; see 78 Vt. 360.

William Batchelder for the defendant.

A party cannot prevent the running of the Statute of Limitations by omitting to do some act which he might have done or which he is required to do. *Reizenstein v. Marquardt* (Iowa), 9 Am. St. Rep. 477; *Dennis v. Bint* (Cal.) 68 Am. St. Rep. 17; *Winchester Turnpike Co. v. Wickliffe* (Ky.) 66 Am. St. Rep. 356.

Pingree, Pingree & Pingree for the claimant.

WATSON, J. This is an appeal from the disallowance by commissioners on the estate of Whitcomb H. Church of a claim presented in favor of the estate of Serena K. Church, based on three promissory notes dated May 1, 1879, signed by Whitcomb H. Church and payable to the order of Daniel Knight, on demand with interest annually,—one for \$750, one for \$250, and

one for \$100. The declaration is special on the three notes, alleging that while yet current, the first named note was indorsed and delivered, and the other two transferred and delivered, by Daniel Knight to Serena K. in her lifetime, etc. There is also a count for money had and received. Appellee pleaded the general issue and the Statute of Limitations. Replication that the interest on the notes was given by the will of Serena K. to Whitcomb H. during his lifetime, and accepted by him, and therefore the Statute of Limitations was held in abeyance and suspended for the same period. The rejoinder was a general denial.

Whitcomb H. Church and Serena K. Church were husband and wife. They resided in West Lebanon, N. H., until the death of Serena K., May 11, 1894. Whitcomb H. continued to reside there until his death, September 24, 1903. Serena K. was the daughter and only heir at law of Daniel Knight who, surviving his wife, died December 15, 1883.

That the notes were excuted by Whitcomb H. to Daniel Knight no question was made. But the indorsement, "Pay to the order of S. K. Church," signed "Daniel Knight," on the \$750 note was admitted in evidence subject to exception. No evidence was introduced tending to prove that this indorsement was made by the payee of the note or by his authority. The admission of it was therefore error (2 Stark. Ev., 4th Am. Ed. 246), but not reversible error if the amount due on this note is recoverable under the count for money had and received. In respect to the other two notes there is no finding of a transfer and delivery by the payee to Serena K. as specially alleged. Whatever recovery is had upon any of the notes must therefore be under the common count, regarding which the only claim or objection made by the appellee is that no recovery can be had thereunder, since there is no finding that the notes were inherited by Serena K. from her father, nor as to how she became the owner of them. The record states that by her will "she gave to her husband all the income of her property, including all interest on the three notes in suit." Included in this finding is the basal idea that these notes were a part of her property. Her ownership being thus in effect established, it is presumed to continue, nothing to the contrary appearing. This shows the notes to be a part of her estate, and as such they were provable by her personal representative against her husband's

estate. *Spaulding v. Warner's Estate*, 52 Vt. 29; *Purdy v. Estate of Purdy*, 67 Vt. 50, 30 Atl. 695.

No question is made but that all the notes were kept alive during the lifetime of Serena K. by payments thereon from time to time, the last being made April 23, 1894, eighteen days before her death. The claim of the appellee is that "the statute began to run against the notes as soon as the executor qualified, June 5, 1894. (Except as suspended for two years by the statute)." And that thereafter no payment, nor written waiver or acknowledgment was made, which prevented the statute from becoming a bar long before the maker's death. The provisions of the will upon which appellant relies in support of his replication are as follows: "Fourth.—I give and bequeath to my beloved husband, Whitcomb H. Church, the income of all the residue and remainder of my real and personal estate including all interest on the notes I now hold against him, with the privilege and right to sell and convey my said real estate at any time after my decease, for life, and from and after the termination of his estate to the 'Faith Home for Indigent Women' at Portsmouth, New Hampshire, the sum of eight hundred dollars, and to Clara Church Howe the sum of one hundred dollars, and all the residue and remainder to the aforesaid Louisa P. Irving to be disposed of as I may direct.

Fifth.—Should my said husband, Whitcomb H. Church, refuse to accept the terms specified in this my last will and testament, I hereby direct that my said estate shall be settled as the law directs and after he, my said husband, receives his portion, I give and bequeath all the residue," etc.

Louisa P. Irving, the above named legatee, was called as a witness by the appellant and testified that several years before the testatrix's death the witness received a letter from her; that the witness showed the letter to Whitcomb H. after his wife's death, whereupon he delivered to the witness the articles named in the letter to be disposed of as therein specified. The letter contained directions,—to which reference is made in the will,—from the testatrix to the witness for the latter's disposition of said articles which were a part of the former's estate. The appellee objected to the admission of the testimony of the witness, and the letter, as affecting the bar of the Statute of Limitations. The evidence had a tendency to show that Whitcomb

H. accepted the provisions of the will, and was properly admitted.

It is urged that unless the passing over of the articles as this evidence tended to show was an acceptance of the will, the transcript shows nothing done or said by Whitcomb H. having that effect. However this may be, there was no evidence to the contrary. The rule is that *prima facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given. And the estate so given being for his benefit, he is presumed to assent to it until the contrary appears. *Townson v. Tickell*, 3 Barn. & Ald. 31; *Blanchard v. Sheldon*, 43 Vt. 512; *Pope v. Savings Bank*, 56 Vt. 284. This presumption obtains on the ground of implied benefit, even though the beneficiary be ignorant of the transaction. *Tarr v. Robinson*, 158 Pa. St. 62.

In the fourth paragraph of the will the testatrix made a specific bequest to her husband of the interest on the notes in question for the term of his life, and by necessary implication, if he accepted the provisions of the will, the notes themselves were to be held by her executor uncollected, as they then were, for the same period, without which this specific bequest could not be carried into effect. From the words of the will the probability of such intention by the testatrix is so strong that a contrary intention cannot be supposed. In *Marx v. McGlynn*, 88 N. Y. 358, there was no direct or express devise of the real estate to the executor in trust, but he was to receive the income thereof. He was to pay the necessary expenses of the estate and pay over the income to the *cestui que trust*. It was held that it must be implied that the testatrix intended that the executor should take the title of the real estate in trust in order that he could manage and control the same, and carry out the trust intended. See also *Woodward v. James*, 115 N. Y. 346; *Dorr v. Wainwright*, 13 Pick. 328. It is extremely unfit that the legatee taking a life interest in notes of which he is the maker should have the possession and control of the notes themselves. Hence the rule laid down in *Park's Admr. v. American Home Missionary Society*, 62 Vt. 19, 20 Atl. 107, does not apply.

It appears from the statute of New Hampshire, proved in the case, that if the husband did not wish to accept the provisions of the will in his favor he was at liberty to waive them within a specified time by filing his waiver in writing in the

probate office, and take his portion as prescribed by statute in case of intestacy. This he did not do. He accepted the provisions of the will. He thereby in legal effect assented to all the terms and conditions annexed to it, and yielded every right inconsistent with such terms and conditions. One who accepts of a devise or bequest does so on condition of conforming to the will, and is bound to give full effect to that instrument so far as he can, whether the testamentary provision accepted be in lieu of some right, or as a mere bounty. No one is allowed to disappoint a will under which he accepts a benefit. *Meech v. Estate of Meech*, 37 Vt. 414; *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625; *Hoyt v. Hoyt*, 77 Vt. 244, 59 Atl. 845; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Caulfield v. Sullivan*, 85 N. Y. 153; *Lee v. Tower*, 124 N. Y. 370.

Since under the provisions of the will accepted by Whitcomb H. the notes were to be held uncollected during his life, it follows in law (1) that no action could be maintained by the latter for their collection within that time; and (2) that the right of action being thus suspended, the running of the Statute of Limitations was correspondingly suspended also. *Thatcher v. Lyons*, 70 Vt. 438, 41 Atl. 428; *Fairbanks v. Devereaux*, 58 Vt. 363, 3 Atl. 500.

Judgment affirmed with interest on the amount found due since December 4, 1906, to be certified to the probate court.

TOWN OF RIPTON v. TOWN OF BRANDON.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed August 10, 1907.

Paupers—Need of Assistance—Determination by Overseer—Effect—Evidence—Value of Property—Towns—Support of Paupers—Action for Reimbursement.

In an action by one town against another for expenses incurred in the support of a pauper, it was proper to allow plaintiff to prove by the pauper's son, who was cotenant with him in the ownership of certain real estate incumbered by a mortgage securing a debt fully paid except one note, that it was agreed between themselves that the father should pay the remaining note if he kept the place, and that, if he could not pay it, the witness was to have the property.

The quadrennial appraisal of the taxable real estate in a town, duly executed, verified, and filed according to law, is a public document, and therefore, admissible in evidence on the question of the value of such real estate. *Hubbard v. Moore*, 67 Vt. 532, distinguished.

In an action by one town against another for expenses incurred in the support of a pauper, on an issue as to the value of certain real estate owned by the pauper and his son, an offer to prove "by the town clerk" of the town where that real estate was situated, "from the grand lists" of said town for certain years, that the pauper and his son were listed together for real estate there of the value of \$190, was properly excluded, as an offer to show the contents of the grand lists by parol.

Whether a person is poor and in need of assistance for himself and family, within the meaning of V. S. 3171 providing for relief in such cases by the overseer of the poor, does not depend alone on the amount and value of his property, but on the exigencies of his then situation.

The determination that a person is poor and in need of assistance, made by the overseer of the poor of the town furnishing such assistance, does not constitute a final adjudication that the cir-

cumstances of the person are such as to entitle him to relief, as against another town where he last lived for three years, supporting himself and family, and which the town that furnished such assistance has sued for reimbursement; but that is a question for the jury to determine under proper instructions. *Holloway v. Barton*, 53 Vt. 300, distinguished.

ASSUMPSIT to recover expenses incurred in the support of a pauper. Plea, the general issue. Trial by jury at the June Term, 1906, Addison County, *Miles, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

It appeared that on February 8, 1905, in plaintiff town, Charles J. Robbins, the alleged pauper, who had last lived for three years supporting himself and family, in defendant town, became so dangerously ill with gall stones that an operation was decided upon by the physicians called to attend him; that the operation was accordingly performed on Feb. 10; that thereupon the overseer of the town of Ripton employed a physician and a trained nurse to attend and care for said Robbins, and also employed one Huntley to furnish him room, board, and other necessities; that these services and expenses were paid for by plaintiff through its overseer of the poor, which payments are the items relied upon in plaintiff's specifications.

The defendant, among other things, contended that said Robbins was not a pauper at the time in question because he then had available property. As to this, it appeared that on March 16, 1899, said Robbins became the owner of about one and one-half acre of land with a dwelling house and barn thereon; that a few days later he and his wife mortgaged this property to the Brandon Cemetery Association to secure two notes of \$50 each, payable on or before one and two years from date, respectively; that on December 8, 1900, he and his wife quit-claimed an undivided half interest in these premises to their son John W., in consideration of \$50; that by agreement of all parties this \$50 was paid by the son to said Association to apply on one of said notes, which was thereupon cancelled and discharged. Matters remained in that situation up to and during said sickness of said Charles J., all the interest on the remaining note having been paid except about two dollars. For "a considerable time" before said sickness, and thence to the time of

the trial, Charles J. Robbins and his said son, each with his wife and family, resided on said premises.

W. H. Bliss for the defendant.

The quadrennial appraisal should have been admitted. The assessors act judicially and their acts bind the town of which they are sworn officers. The appraisal is an admission of the value by the town. 3 Wig. Ev., §1640; 1 Greenl. Ev., §§484, 493; 9 Enc. of Law, (2nd Ed.) 882-3; *Ronkendorff v. Taylor*, 4 Peters 349; *Evanston v. Green*, 99 U. S. 660; *Dudley v. Chilton Co.*, 66 Ala. 593; *Pittsfield v. Barnstead*, 40 N. H. 477; *Grossbeck v. Seeley*, 13 Mich. 329; *Weatherhead v. Guilford*, 62 Vt. 327; *Springfield v. Chester*, 68 Vt. 294; *Bartlett v. Wilson*, 59 Vt. 23.

Davis & Russell and *J. E. Cushman* for the plaintiff.

Valuations made by public officials for purposes of taxation are nowhere admitted, except as containing admissions against owners. In many jurisdictions they are not even admitted for that purpose, because as they were made for a different purpose, they are not criterions of market values, but mere hearsay; and because being made for the sole purpose of assessment and collection of taxes, are not the best evidence. *Spink v. Ry. Co.*, 26 R. I. 115; *Kenerson v. Henry*, 101 Mass. 152; *Flint v. Flint*, 6 Allen 34; *Anthony v. Ry. Co.*, 162 Mass. 60; *Ridley v. R. R. Co.*, 124 N. C. 37; *Birmingham M. R. Co. v. Smith*, 89 Ala. 305; *Martin v. R. R. Co.*, 62 Conn. 331; *Storrs v. Robinson*, 74 Conn. 443.

It is the valuation made by the party owner, by way of inventory, which afterward becomes a part of the assessors' record, and not the assessors' valuation, that in some jurisdictions has been held admissible as an admission. *Hubbard v. Moore*, 67 Vt. 532; *Manning v. Lowell*, 173 Mass. 100; *Nufflin Bridge Co. v. Juniata Co.*, 144 Pa. 365; *West Chester et al. v. Chester Co.*, 182 Pa. 40; *Boyer v. St. Louis etc. Co.*, (Tex.) 76 S. W. 441; *Vernon etc. Co. v. Savannah*, 95 Ga. 387.

Statutes providing relief for poor persons have always been humanely, liberally, and reasonably construed by this and other

Courts of last resort, as stated in the charge. *Blodgett v. Lowell*, 33 Vt. 174; *Wallingford v. Southington*, 16 Conn. 435; *Fish v. Perkins*, 52 Conn. 200; *Charleston v. Groveland*, 15 Gray 15; *Goodale v. Lawrence*, 88 N. Y. 513.

WATSON, J. The plaintiff was properly allowed to show by the witness John W. Robbins that, as between him and his father, the alleged poor person, the latter was to pay the remaining note secured by the mortgage on the real estate owned by them as tenants in common, if he (the father) kept the place, and that if he could not pay it the witness was to have the place. The evidence had a bearing on the question of the father's available property.

The value of this real estate was a material question, and one on which witnesses disagreed: those on the part of the plaintiff estimating the value of the entire premises at from one hundred dollars to one hundred fifty dollars, and the alleged pauper's interest therein, from no available value to fifty dollars; while some of the defendant's witnesses valued the place at two hundred dollars, and some at two hundred fifty dollars. On this question defendant called the town clerk of Ripton with the last quadrennial appraisal of the real estate in that town, made in 1902, and offered to show by the witness and the appraisal that therein the premises above mentioned were appraised and listed to Charles J. Robbins and John W. Robbins as owners at one hundred ninety dollars. One question before us is on the exclusion of this evidence on the grounds of plaintiff's objection that the appraisal was made for another purpose, and the appraisers not in court for cross-examination.

The quadrennial appraisal offered is a list of all the taxable real estate in the plaintiff town according to several ownership, with the names of the respective owners when made, and the valuation of the land held by them. It was made by public officers acting under oath of office, enjoined by statute to appraise all the taxable real estate in town at its just value in money, attach to the list thereof a certificate signed by a majority of them verified by oath that they had so done, and return the same to the town clerk, in whose office it was by law required to be kept. This list is a public document. *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146. As far as it has reference to real estate owned wholly or in part by the alleged poor person it was per-

tinent to the issue, and accompanied with proof by way of the witness offered therewith that the list came from the proper repository, also of the identity of the property and owners named,—all fairly within the scope of the offer,—the evidence was admissible. Mr. Greenleaf lays down the rule that all documents “of a public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the persons, on whose authority the truth of the documents depends. The extraordinary degree of confidence, it has been remarked, which is reposed in such documents, is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose; but partly also on the publicity of their subject-matter.” Among books falling within this principle of law the author mentions books of assessment of public rates and taxes, the books of the post-office, and custom-house, and registers of other public officers; the registers of births and marriages, made pursuant to the statutes of any of the United States; and the books of record of transactions of towns, city councils, and other municipal bodies. 1 Greenl. Ev. §§483, 484. The same doctrine is laid down in 1 Stark. Ev. part II, §40.

Like questions in principle have been passed upon by this Court in other cases. In *State v. Intoxicating Liquors and Claimants*, 44 Vt. 208, assessment rolls made by assessors under the laws of the United States, and entries made by collectors under the same laws of payments made by the claimants of special taxes as retail dealers in spirituous liquors, were held to come fairly within the rule above given from Greenleaf, and properly admitted as evidence tending to show that the claimants had procured the liquors in question for the purpose of retailing them. In *State v. Spaulding*, 60 Vt. 228, 14 Atl. 769, the doctrine was again applied, the Court holding that the records in the office of the collector of internal revenue were competent evidence to show that the respondent had obtained a United States license for the sale of liquor, as pertinent evidence on the question of whether he did in fact sell, and also on the question of who was conducting the business. A sworn copy was there admitted. In *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438, a certified copy of record of the certificate of death made by an attending physician during the last illness of the deceased

was received as evidence of the cause of death. The certificate was filled out, giving among other things required by statute the cause of death, and was properly recorded. It was held that the record of such a certificate was a public record, and that a certified copy thereof was presumptive evidence of such facts stated therein as the attending physician was by law required to certify, and were presumably within his personal knowledge.

Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465, is relied upon by the plaintiff as an authority to the contrary. Yet the holdings in that case, rightly understood, are in harmony with those in the other cases to which reference has been made. That was a suit in equity by a partner for the dissolution and winding up of the co-partnership and the setting aside of certain conveyances of real estate as in fraud of partnership debts. The other partner and the person to whom the fraudulent conveyances were made were defendants. The defendants contended that the real estate in question was not partnership property. It was held that the grand lists of the town showing that this real estate was set to the firm, in connection with evidence tending to show that the firm paid the taxes thereon, were properly admitted in evidence as bearing on the question whether it was or was not partnership property. It appears from an examination of the master's report in the case that the orator, for the purpose of showing the indebtedness of the firm April 1, 1891, introduced the firm's tax inventory of that year containing a list of the debts in the defendant partner's handwriting; and that in argument counsel for defendants asked the master to consider as evidence the value of the firm's personal property set forth in the inventory, which the master refused to do. It was held that the inventory was properly admitted as an admission by the partner making it of the firm's debts and liabilities. But that to have considered the value of the firm's personal estate would have been error, "for the value was fixed by the listers." It is upon the latter holding that the plaintiff here relies.

When an inventory, sworn to and delivered, is properly filled out in the opinion of the listers, the taxable personal estate contained therein shall be appraised by them at its value in money on the first day of April. V. S. 409, 410. Yet the appraisal so made is subject to voluntary change by the listers until the abstract of individual lists is lodged in the town clerk's office for the inspection of tax-payers. And thereafter it may

be changed by the listers on the hearing of an aggrieved taxpayer, or by the board of civil authority on appeal. When all such hearings are had and decisions made, the grand list is corrected and completed accordingly, sworn to by the listers, and deposited in the town clerk's office. See V. S. 427-433. Since the value of the personal property fixed by the listers in and shown by the inventory in question was not conclusive or binding on either the listers or the tax-payer, it was not an official statement so made under the sanction of an oath of office, or under that of official duty, as to entitle it to that extraordinary degree of confidence necessary to its reception in evidence without confirmation by the obligation of an oath. The inventory in the respect named was not therefore within the rule making public documents evidence, and the statement of value therein by the listers was governed by the common rule regarding hearsay, which in effect was the reason assigned for the holding. See *Ronkendorff v. Taylor's Lessee*, 4 Pet. 349, 7 L. ed. 882.

On the same question of the value of the alleged poor person's share in the real estate, "the defendant offered to show by the same witness (town clerk), from the grand list of said Ripton of 1903 and 1904, that said Robbinses were listed together in those years for real estate in Ripton of the listed value of one hundred ninety dollars." The court below may fairly have construed this as an offer to show the contents of those grand lists in the respects specified by the oral testimony of the witness. If so construed, the evidence was properly excluded. Hence error does not appear. Whether the grand lists are admissible in any event for the purpose named in the offer is not considered.

It is urged, however, that since the premises constituted the homestead of the alleged pauper and his wife, he had no available interest therein with which to help himself in such time of need. And hence even though the valuation was all defendant claims, the exclusion of the evidence by the witness and the quadrennial appraisal was harmless. But we are not warranted in so holding. Whether a person is poor and in need of assistance for himself or family within the meaning of the law (V. S. 3171) does not depend alone upon the amount and value of property owned by him. Giving that section of the statute a proper and humane construction, a person may be poor and in

need of assistance for himself or family, even though he have some property, if the property is inaccessible, or otherwise unavailable, and he without credit or friends, so that he can not for the time being in case of emergency suitably supply the necessary wants. This is implied by the terms and provisions of section 3174 for the relief of transient persons suddenly taken sick or lame, etc., and "in need of relief." The town rendering such assistance must first look to the person assisted to defray the expense of his support; but if he is not of sufficient ability to defray such expenses, then a recovery may be had from the town in which he is legally settled. And the same thing is recognized by this Court in *Danville v. Sheffield*, 50 Vt. 243. On the other hand, a person without property may have such credit or friends as will reasonably put him beyond the need of public assistance, however sudden, unexpected, or pressing the necessity may be. Clearly, it is a question for the jury to determine in the light of all the circumstances and under proper instructions from the court.

In determining whether a person is poor and in need of assistance, and also as to what is necessary for his relief as a poor person, an overseer must exercise a sound discretion. *Monson v. Williams*, 6 Gray 416. And when a town, *bona fide*, so relieves a person apparently a pauper, and actually standing in need of relief, the town in which such person has the statutory residence, if given the required notice, will be liable for the expense, although it may turn out that the person relieved had some property. *Poplin v. Hawk*, 8 N. H. 305; *Hardin County v. Wright County*, 67 Iowa 127; *Brewer v. East Machias*, 27 Me. 489; *Groveland v. Medford*, 1 Allen 23.

We cannot however agree with the plaintiff's contention that when the overseer determined to afford assistance and so did, it was a final adjudication that the circumstances of the alleged poor person were such as to entitle him to such relief. Our attention is called to the case of *Holloway v. Barton*, 53 Vt. 300, in support of this position. But there the action was based upon an alleged promise of the overseer of Barton to pay the plaintiff for the support of two alleged transient paupers. It was held that in this State the authority of the overseer pertaining to the relief of paupers is not delegated by the town but conferred by law; that the overseer was authorized to determine

whether he would furnish relief to transient paupers and whether the facts made the case a proper one for relief; that if the overseer in answer to a call for relief from a transient person, contracts for the furnishing of such relief, this is an adjudication, final and unassailable, that the person is entitled to relief; that whether the overseer had made the proper inquiries in the premises the person furnishing the relief was under no duty to ascertain; and that the town could not repudiate his contracts made in matters coming within the purview of his official duty. But there is no ground for saying that a town with which the overseer, thus furnishing relief, has no relation, is bound by his acts. In cases arising against another town to recover the expense of the relief so furnished, the acts and doings of the overseer are subject to the revision of courts, *Moultonboro v. Tuftonboro*, 43 N. H. 316.

Several other exceptions were saved and argued, but being of such a nature that any decision rendered thereon would be of no aid in another trial of the case, they are not considered.

Judgment reversed and cause remanded.

ELEANOR F. B. NICHOLAS v. ESTATE OF CAIRA R. NICHOLAS.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed August 10, 1907.

Probate Court—Appeal—Jurisdiction of County Court—Judgment—Vacating—Taxing Costs Without Notice.

In the trial of an appeal from the disallowance of a claim presented to the commissioners on a decedent's estate, at the close of appellant's evidence before the jury, on her application that the jury be discharged and the case continued, on payment of costs to defendant, the county court discharged the jury, and later

ordered that, on payment of a certain sum to defendant on or before a specified time for witnesses and counsel for the term, the case be continued, "otherwise let judgment be entered for defendant * * with costs and certified down." *Held*, that judgment entered by the clerk after the expiration of the time limited in the order, on failure of appellant to make the required payment: "Judgment that the claim of appellant against the estate of Cairra R. Nicholas be disallowed with costs of defendant, and ordered sent to probate court. Defendant's costs \$20.86," was in form appropriate to the case and in compliance with the order, as such an order is not understood necessarily to contain the exact language of the judgment entry, but the clerk is supposed to understand the order with reference to the case, and to make the entry in proper form.

The docket entries by intendment show a non-compliance with the order, for without that, no judgment could properly be entered. Though the docket does not show an affidavit filed establishing appellant's non-compliance with the order, since it otherwise appears that such affidavit was in fact left with the clerk for record, whether that was a prerequisite to the entry of judgment is not considered.

When, pursuant to the order of court, judgment was entered by the clerk and certified to the probate court, the jurisdiction of the county court was not only exhausted, but the case was no longer there; hence that court had no jurisdiction at a succeeding term to bring the case forward on its docket and vacate the judgment. *Farmers Mut. Ins. Co. v. Reynolds*, 52 Vt. 405; *Johnson v. Shumway*, 65 Vt. 389, and *Arlington Mfg. Co. v. Mears*, 65 Vt. 414, distinguished.

Where no error in the taxation of costs is claimed, the fact that they were taxed without the notice required by Rule 31 of the county court is not ground for vacating the judgment.

MOTION to bring forward on the docket the case of *Eleanor F. B. Nicholas v. Estate of Cairra R. Nicholas*, and to vacate the judgment rendered therein, for certain specified irregularities. Heard at the September term, 1906, Washington County, *Powers, J.*, presiding. Motion denied as matter of law. The claimant excepted. The opinion fully states the case.

Geo. W. Wing and Samuel H. Crandall for the claimant.

The cause notwithstanding the erroneous certificate issued to the probate court was still in the county court; its jurisdiction had not been exhausted when appellant's motion was made, all proceedings subsequent to the order should have been vacated and annulled, and the cause should have been brought forward upon the docket, and other proper relief granted to appellant. *Underhill v. Jericho*, 66 Vt. 186; *Legg v. Overbaugh*, 21 Am. Dec. 115; *Watson v. Travers*, 8 Johns. (N. Y.) 567; *Lovett v. State of Florida*, 16 Law Ann. 313; *Scoville v. Brock*, 76 Vt. 385.

The following acts or omissions have been treated as irregularities warranting relief by motion or appeal to the party prejudiced thereby.

For entering judgment in disregard of a rule of court. For entering a default without proper notice. *Seaman v. Reynolds*, 40 N. Y. 545. For a variance between a clerk's minutes and the "judgment roll." *Martin v. Scott*, 4 Abb. 365. Where a plaintiff improperly enters judgment. *Williams v. Reid*, 5 Duer. 601; *Simmons v. Blake*, 20 How. (N. Y.) 484. An "irregularity" has been defined to be "not adhering to the prescribed rule or mode or proceeding and which due and orderly conduct of the suit required to be taken." *Oil Co. v. Hubbell*, 76 N. Y. 543; *Green v. Warren*, 14 Hun. 434.

It was necessary that the docket should show an affidavit filed establishing appellant's default and that a "Default" had thereafter been entered thereon for non-compliance with order, as essential proceedings to support the judgment directed by the order, and for want of same, the judgment was irregular and erroneous. *Sheldon v. Sheldon et al.*, 37 Vt. 152; *Barney v. Goff*, 1 D. Chip. 304; *Decker v. Kitchen*, 21 Hun. 332.

The affidavit of non-compliance with the order of the court should have been properly indorsed, filed, and minuted on the docket, as it was an original paper, and a prerequisite to the clerk's right to enter judgment. *Gold v. Death*, Hobart 92, 6; *Beaudry v. Mayor of Montreal*, 11 Moore's P. C. 426; *Hubbard v. Dubois et al.*, 37 Vt. 194.

The taxation of costs without notice was in violation of county court Rule 31, and fatally irregular. *Cooper v. Arnold*, 2 Edw. Ch. 622; *Poneridge v. Jackson*, 2 Edw. Ch. 579.

The judgment record relied upon is lacking in the essentials of a good record. "A record must possess certain necessary features if it is to be treated as such. A judgment record should

contain (1) the substance at least of the writ and declaration; (2) and sometimes of the officer's return of service; (3) a statement of the appearances for such parties as did appear and by what attorneys if any; (4) of the adjournments had; (5) the action of the court in ordering a jury trial, if any, and (6) in rendering judgment and (7) in taxing costs for both parties in case of an appeal; in brief a correct statement of every official act." Vermont Justice, 1905 Ed. §445, p. 375; *Read v. Sutton*, 2 Cush. 115; *Coolidge v. Inglee*, 13 Mass. 41; *Gibson v. Holmes*, 78 Vt. 14.

Lord & Carleton and Hale K. Darling for the defendant.

When appellant's motion was made, the case was beyond the control of the county court, and in the probate court. *Atherton v. Fulton*, 55 Vt. 388; *Monahan v. Monahan*, 77 Vt. 155; *Slason v. Cannon*, 19 Vt. 219; *Underhill v. Jericho*, 66 Vt. 183.

Even if this matter were within the discretion of the county court, it would have been error to have granted the motion. A new trial cannot be obtained by attacking a judgment in this irregular way. *Ins. Co. v. Partridge*, 49 Vt. 121; *Weeks v. Prescott*, 54 Vt. 313; Vanfleet's Collateral Attack, §§3, 6.

WATSON, J. This is a motion to the county court of Washington County to bring forward upon its docket the above named case, vacate and set aside the judgment rendered therein, for irregularities specified, and as illegally and wrongfully entered, and the case entered continued, to be proceeded with *de novo*.

The original case in that court was an appeal from the decision of the commissioners appointed by the probate court for the district of Washington to receive, examine, and adjust claims against the estate of Cairn R. Nicholas, deceased, in the disallowance of the appellant's claim. At the March Term, 1906, of the county court, a trial by jury was entered upon, each party being represented by attorneys of record. At the close of the appellant's opening case, the appellee moved for a verdict on the ground that no cause of action had been established. This motion was not granted, but on application of appellant's counsel that the jury be discharged and the case continued to the September term on payment of costs to the appellee, the jury was discharged, and some days later the court handed down

the following order: "On payment of two hundred twenty-five dollars to the defendant on or before May 1, 1906, for witnesses and counsel this term, let the case be continued, otherwise let judgment be entered for the defendant as of this term with costs and certified down. Enter."

This order was not entered upon the docket of the court, nor upon the blotter docket of the clerk, and is to be found only amongst the papers on file. That term of court took its final adjournment on April 19.

The terms of the order were not complied with by the payment of the sum specified within the time limited. Thereupon on May 3, by request of appellee's attorney of record and on his affidavit of such non-compliance, the clerk made entry on the docket as follows: "Judgment that the claim of the appellant against the estate of said Caira R. Nicholas be disallowed with costs of defendant, and ordered sent to probate court, May 3. Defendant's costs \$20.36. Certified May 4."

The certificate delivered by the clerk was filed in the probate court August 22, 1906, and ordered by that court to be recorded.

At the following September term of the county court, the appellant made this motion on the affidavits of herself and of her counsel, and upon all the papers, files, dockets, and records in the cause, for an order setting aside and vacating all proceedings had therein since the making of the order by the court, at the March term, for the illegalities, irregularities, and causes specified in the moving affidavits, and that the judgment entered on the docket of the March term, and the certificate issued thereunder, be vacated and set aside for the irregularities specified, and as illegally and wrongfully entered; and that the cause be brought forward and continued. On hearing the motion was denied as a matter of law. Was this error? is the sole question before us.

That the court had power to order judgment to be entered for the appellee on non-payment of the sum specified within the time fixed, no question is made. It is said, however, that the judgment entered was not in accordance with the order. But the judgment was in form appropriate to the case, and in compliance with the order. Such an order is not understood necessarily to contain the exact language of the entry of judgment

to be made. The clerk is supposed to understand the order with reference to the case, and to make the entry in proper form.

It is urged that the appellant has been deprived of a substantial right, in that no notice of the taxation of costs was given her as required by Rule 31 of the county court. But a judgment will not be vacated because of mere error in the taxation of costs (*Harriman v. Swift*, 31 Vt. 385), and much less, even though taxed without notice, where as here no error therein is claimed. The further claim is made that the docket should show the affidavit filed establishing the appellant's non-compliance with the terms of the order, and that by reason thereof a "default" had been entered, as essential proceedings to support the judgment directed, and that for want of such docket entries the judgment was irregular and erroneous.

Since such an affidavit was in fact left with the clerk by the appellee's attorney of record, we need not consider whether it was a prerequisite to the entry of judgment. The docket entries by indentment show a non-compliance with the order, for without such failure no judgment could properly be entered. *Armstrong v. Colby*, 47 Vt. 359; *State v. Shaw*, 73 Vt. 149, 50 Atl. 863.

The omission to file the affidavit, and the other claimed irregularities respecting the details of record, neither entered into nor affected the judgment rendered and certified, nor the remission of the case to the probate court, hence they need not be further noticed.

The jurisdiction of the county court was appellate only, and the statute required that the final decision and judgment should be certified to the probate court, where the same proceedings would be had as though such decision had been made in that court. V. S. 2599. When the judgment was entered by the clerk, pursuant to the order of court, and certified as required by this statute, the jurisdiction of the county court was not only exhausted, but the case was no longer there.

It follows that the court had no power at the following term, on motion, to vacate and set aside the judgment; and since the case was not then within the control of that court, no order could be made to bring it forward on the docket. In *Underhill v. Jericho*, 66 Vt. 183, 28 Atl. 879, the original cause came to this Court, on facts found on issue joined on plea to the jurisdiction. The court below rendered judgment for the defend-

ant. This Court reversed that judgment, held the plea insufficient, gave judgment in chief for the plaintiff, and remanded the cause to the county court for the assessment of damages. At a subsequent term a petition was preferred to this Court praying that the cause be brought forward upon the docket and the mandate corrected, or changed, so as to give the petitioner the right to try the case in the county court on its merits. It was held that when the case was disposed of and regularly remanded to the county court the jurisdiction thereof of the Supreme Court was exhausted, and that it had no power on petition to lay hold of and recall it. The case of *Monahan v. Monahan*, 77 Vt. 155, 59 Atl. 176, was a motion made at the October term, 1904, of this Court that the original case in chancery between the same parties, be brought forward from the docket of the preceding term, and the entry then made therein, affirming the decree and remanding the case stricken off, and the case continued. It was held that the case was not then in this Court, and the motion was denied. See also *Amazon Ins. Co. v. Partridge*, 49 Vt. 121; *Weeks v. Prescott*, 54 Vt. 318.

The cases of *Farmers' Mut. Ins. Co. v. Reynolds*, 52 Vt. 405; *Johnson v. Shumway*, 65 Vt. 389, 26 Atl. 590; and *Arlington Mfg. Co. v. Mears*, 65 Vt. 414, 26 Atl. 587, cited by the appellant as authority for her contention, are not applicable. The first case named was a petition to the county court praying that a cause wherein the petitioner was defendant and the petitionee was plaintiff be brought forward on the docket, that the judgment by default rendered therein at the preceding term be stricken off, and that the petitioner have leave to enter and defend. It appeared that the attorney of the defendant in the original case neglected to appear and answer to that suit at the term in which it was entered, because he mistook the day on which the term commenced. It was held that the power invoked by the petition was one incident to a court of general jurisdiction to revise and correct its records; and that it was within the discretion of the court where the default was entered to set aside the default at the term in which it was entered or at a subsequent term. In the next case cited, *Johnson v. Shumway*, the plaintiff in the original action was in default of appearance to prosecute his suit, and judgment of nonsuit was entered against him. On petition brought at a subsequent term of the court to bring the case forward and strike off the judgment,

on the ground that the plaintiff's counsel erroneously supposed the original case not for trial at the term when the judgment was rendered, it was held that to grant such relief was within the discretionary power of the court.

It will be observed that in each of these cases final process would issue from the court in which the judgment sought to be set aside was rendered. Neither case had passed beyond the control of that court by its remission to some other court, as in *Underhill v. Jericho*, 66 Vt. 183, 28 Atl. 879, in *Monahan v. Monahan*, 77 Vt. 155, 59 Atl. 176, and in the case before us, hence the reason for the distinctive doctrines laid down in the two classes of cases. In *Arlington Mfg. Co. v. Mears*, the other case cited by the appellant, the motion to strike off the judgment by default, was made on the ninth day of the same term the default and judgment were entered. It was held among other things, that to strike off such entry at any time during the term when it was made, had always been within the discretionary power of the county court.

Judgment affirmed.

STATE OF VERMONT v. SWANZEY WILSON.

January Term, 1907.

Present: ROWELL, C. J., MUNSON, and WATSON, JJ., and WATERMAN,
SUPERIOR J.

Opinion filed August 10, 1907.

Criminal Law—Misprision of Felony—Definition—Information
—Sufficiency—V. S. 4883.

It is a rule of construction that, if a statute gives a new remedy in a particular case, this shall not extend to alter the common law in any other case.

Misprision of felony is an offence at common law, and is a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with or subsequent assistance of him as will make the concealer an accessory, either before or after the fact.

The common law as to the misprision of felony is a part of the law of this State, that offence not being confined to the crime of treason by V. S. 4883, providing for the punishment of misprision treason.

An information for misprision of felony setting forth with requisite certainty the commission of grand larceny, giving the name and place of residence of the offender, and alleging that "all of which" the respondent "well knew," is not insufficient for that guilty knowledge is not alleged; that the name of the principal offender is not charged as known to the respondent; that the time of the commission of the felony is not alleged as known to the respondent; and that it is not alleged that the principal offender's usual place of abode was then known to the respondent.

Where an evil intent accompanying an act is necessary to constitute such act a crime, that intent must be alleged in the information or indictment, and must be proved.

An information for misprision of felony is insufficient, unless it alleges that the respondent intended to obstruct and hinder the due course of justice and to cause the felon to escape punishment.

An information for misprision of felony which, after alleging the commission of grand larceny, with the name and place of residence of the felon, alleges merely "all of which" the respondent "well knew and then and there did conceal and keep secret, contrary to the law of the land," etc., is insufficient as not showing respondent's neglect to discover the felon and his place of resort to the officers of justice.

INFORMATION for misprision of felony. Heard on demurrer to the information at the October Term, 1906, Essex County, Tyler, J., presiding. Demurrer overruled, and information adjudged sufficient. The respondent excepted. The information charged that: "John Cunningham, alias Jack Somers, of Topsham, in the County of Sagadahoc and State of Maine, on the

3rd day of July, A. D. 1906, at Concord, in the County of Essex and State of Vermont, with force and arms, one five-dollar bill of good and lawful money of the United States of the value of five dollars, one one-dollar bill of good and lawful money of the United States of the value of one dollar, six finger rings of the value of fifty dollars, a suit of men's clothes of the value of twenty dollars of the goods and chattels of George H. Cummings, then and there in the possession of the said George H. Cummings being found, feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State; all of which Swanzey Wilson, alias Fred Smith, of Topsham, in the county of Sagadahoc and State of Maine, on the 3rd day of July, A. D. 1906, at Concord, in the county of Essex and State of Vermont, well knew and then and there did conceal and keep secret, contrary to the law of the land and against the peace and dignity of the State."

R. W. Simonds for the respondent.

If this is an information for misprision of felony under V. S. 5160, the pleader is bound to set out the principal crime, and that the respondent before the felony was committed, did unlawfully and feloniously counsel, aid, abet, etc., the principal to do and commit the said felony. 2 Chitty's Cr. Law, 5; Arch. Cr. Pl. & Ev., 13th Ed. 82; 6 Cox C. C. App. 101; *Rex v. Atkins*, 7 Howell St. T. 231; *Parker's Case*, 2 D. Y. 186 (a); *Rex v. Saunders*, 2 Pow. 473; *Rex v. Donnelly*, Rus. & Ry. 310; *Rex v. Foy*, Vern. & S. 540; *Rex v. Greenwood*, 23 U. C. Q. B. 255.

The common law as to the misprision of felony is not in force in this State, except as to misprision of treason, under V. S. 4881. But if the common law as to misprision of felony is in force in this State, then the information is defective for the following reasons: Guilty knowledge is not alleged; the name of the principal offender is not charged as known to the respondent; the time of the commission of the crime by the principal offender is not alleged, as known by the respondent; nor that the usual place of abode or resort of the principal offender was then known to the respondent; nor that the respondent desired and intended to obstruct and hinder the cause of justice; nor that

the respondent intended to cause the principal offender to escape unpunished; nor that the respondent unlawfully, maliciously, etc., did conceal and keep secret the knowledge he had, if any; nor that the respondent did neglect to discover the alleged felony so committed, to the officers of public justice; nor that the respondent did refrain and forbear to disclose and make known the name, person, and usual place of resort of the principal offender; nor that the respondent had any knowledge of the name, person, or usual place of resort of the principal offender. Bish. Directions & Forms, §§128, 129 and 130; 2 Chit. Cr. Law, 232; 4 Chit. Cr. Law, 14.

Harry B. Amey, State's Attorney, and *Geo. L. Hunt* for the State.

The statute law of Vermont has not impliedly repealed the common law regarding misprision of felony. 8 Cyc. 376b; *In re Lord & Polk Chemical Co.* (Del.), 44 Atl. 775; *State v. Wilson*, (N. H.) 82 Am. Dec. 163.

It is not necessary to allege that the respondent "knowingly" concealed, for knowledge is implied in the statement of the offence. 22 Cyc. 327-8; *State v. Carpenter*, 20 Vt. 9; *State v. Corcoran*, 73 Vt. 404; *State v. Stewart*, 59 Vt. 293. The words "contrary to law" negative all legal excuse. *Bishop v. Com.*, 13 Grath (Va.) 785.

WATSON, J. Misprision of felony is an offence at common law and is described as a criminal neglect either to prevent a felony from being committed, or to bring the offender to justice after its commission, but without such previous concert with or subsequent assistance of him, as will make the concealer an accessory before or after the fact. 1 Hale P. C. 374; 1 Hawk. P. C. ch. 7, sec. 2; 1 Chit. Cr. L. 3; 1 Bish. Cr. L. sec. 717; 4 Steph. Com. 269.

As a part of V. S. ch. 211, touching the crime of treason, section 4883 relates to misprision of treason. The respondent contends that by this section the crime of misprision of felony is confined to the offence therein specified. Treason is a breach of allegiance to a government committed by a person who owes allegiance to it, and is the greatest crime known to the law.

1 Hale P. C. 86; *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37. The offence includes a felony and more. Lord Chief Justice Hale says: "All treason is felony, though it be more." 1 Hale P. C. 497. Mr. Serjeant Hawkins says, "felony is said to be included in high treason." 1 Hawk. P. C. ch. 7, sec. 2. Lord Coke says that in ancient times the word "*felonici*" was of so large an extent as it included high treason; and therefore in the ancient books, by the pardon of all felonies, high treason was pardoned. But afterwards it was resolved that in the King's pardon or charter this word (*felonie*) should only extend to common felonies, and that high treason should not be comprehended under the same, and therefore ought to be specially named. Co. Litt. 391a. And in their *History of English Law*, vol. 2, 498, it is said by Pollock and Maitland that in later times the crimes known to the law were classified as (1) treason, (2) felonies, (3) misdemeanors; "and several important characteristics marked off treason from all other crimes." Such also is the classification made by our statutes. While it may be true that strictly speaking all treasons are felonies, yet there are many other felonies besides treason. It logically follows that since misprision of treason is a concealment of a "felony and the aggravation which makes it treason," it is a crime more heinous than the concealment of a common felony, and not of the same class. Indeed, under our statute the former is a felony, while the latter governed by the common law is a misdemeanor only. Section 4883, on which the respondent relies, expressly relates only to misprision of treason. It does not by implication affect the common law respecting the concealment of other crimes. It is a rule of construction that if a new remedy be given by a statute in a particular case, this shall not be extended to alter the common law in any other case. Bac. Abr. tit. Statutes, (I) 4.

The question then arises whether the common law touching the concealment of felony is a part of the law of this State. In *State v. Keyes*, 8 Vt. 57, it was held that trying to dissuade and hinder another person from attending a public prosecution, knowing such person to be a witness and about to be compelled in due course of law to attend such prosecution, was a punishable offence, on the ground that it tends to obstruct the due course of public justice. And it was there said that the doings of any act having such tendency has always been held indictable

as a misdemeanor at common law. In *Hinesburgh v. Sumner*, 9 Vt. 23, it was held that a note given in whole or in part for the compounding of a penalty, or the suppression of a prosecution therefor, was void and uncollectable, the court saying: "The compounding of penalties is an offence at common law, of dangerous tendency, highly derogatory to public example, and prosecutions are no more to be improperly suppressed by public informing officers, than by common informers." A mere neglect to prosecute a felon or to discover his offence to a magistrate, though perhaps more remote from the principal offence and hence less reprehensible, is a dereliction of the same sort. 1 Bish. Cr. L. sec. 267. There can be no doubt that the common law of the subject is a part of our law. It is applicable to our local situation and circumstances, and not repugnant to the constitution or laws.

It is argued that the information is insufficient for the reasons (1) that guilty knowledge is not alleged; (2) that the name of the principal offender is not charged as known to the respondent; (3) that the time of the commission of the felony set forth is not alleged as known by the respondent; (4) that it is not alleged that the usual place of abode or resort of the principal offender was then known to the respondent. The information sets forth in form and substance with time and place the commission of grand larceny, with the name and place of residence of the offender. It then alleges "all of which" the respondent on the same day and at the same place "well knew," etc. This is a sufficient allegation of knowledge in the respects above named.

It is further urged that the information is defective in that it contains no allegations (1) that the respondent intended to obstruct and hinder the due course of justice and to cause the felon to escape unpunished; and (2) that the respondent unlawfully, maliciously, etc., concealed, kept secret, and neglected to discover the felony together with the name, person, and usual place of resort of the felon, to the officers of public justice. This position is well taken, and the two questions will be considered in their order.

On the question of intent, we quite agree with Mr. Bishop that in principle the motive prompting the neglect of a misprision must be in some form evil as respects the administration of justice. 1 Bish. Cr. L. sec. 721a. And where an evil intent accom-

panying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment or information and proved. 1 Chit. Cr. L. 233. See also 2 Chit. Cr. L. sec. 232; Bish. Directions and Forms, sec. 129.

Regarding the second question, after setting forth the felony the allegation is, "all of which" the respondent "well knew and then and there did conceal and keep secret, contrary to the law of the land," etc. The words "did conceal and keep secret" are not sufficient without further words showing a neglect to discover the felony, with the name and place of resort of the felon. Whether knowledge of the place of resort and a neglect to give information of that particular thing is in all cases essential to the crime, we do not consider; for here the allegations show such knowledge, and having it the respondent was bound to discover that also. Concealment of a crime known to have been committed is negative in character, while to give information thereof to the officers of the law is positive. All knowledge of the crime may be imparted to another person, and yet to meet the requirements of the law such person must be a magistrate or otherwise in authority. Hence without an allegation of neglect to discover, no crime appears. It is said by Lord Coke, after speaking of the punishment for concealment of felonies, "From which punishment if any will save himself he must follow the advice of Bracton, to discover it to the King, or to some judge or magistrate, that for the administration of justice supplieth his place with all speed that he can." 3 Inst. Cap. 65. To the same effect are 1 East P. C. ch. 3, and 1 Russ. Crimes, 411. See also Trials of Regicides, 5 How. St. Tr. 985; Thistlewood's Trial, 33 How. St. Tr. 690.

Nor do the words "contrary to the law of the land" supply this defect. They do not enlarge or extend the force and effect of the words used to describe the act imputed so as to make it unlawful when it was not so by the description itself. Bishop's Case, 13 Gratt. 785.

Since the information is amendable the cause will be remanded.

Judgment reversed, demurrer sustained, information adjudged insufficient, and cause remanded.

WINONA L. TAFT v. RUSSELL W. TAFT.

May Term, 1907.

Present: ROWELL, C. J., TYLER, and MUNSON, JJ., and TAYLOR, SUPERIOR J.

Opinion filed September 14, 1907.

*Divorce—Adultery—Circumstantial Evidence—Probative Force
—Hired Detectives—Credibility.*

In either a civil or a criminal case, adultery may be proved by mere circumstantial evidence; the only requisite being that the proved circumstances be such as to lead the guarded discretion of a reasonable and just man to conclude, with the degree of certainty required by law, that the alleged act was committed.

In a suit for divorce on the ground of adultery, evidence of other occasions besides those relied upon, whether prior or subsequent thereto, is admissible to show an adulterous disposition.

In a suit for divorce on the ground of adultery, though the testimony of private detectives, hired by the petitioner to watch her husband with a view to learning facts upon which to base a suit for divorce, should be regarded with much suspicion, especially where it does not appear that their pay is not dependent on the effect of their testimony, still it cannot be said that such witnesses are always entitled to only slight credibility, or that a divorce should never be granted upon their uncorroborated testimony.

The correct rule is that such testimony is to be weighed like other testimony, tried by the same tests, and the fact that it is given by a hired witness considered by the triers, and this Court will not assume that it was not so weighed and considered.

PETITION FOR DIVORCE, on the grounds of adultery and intolerable severity. Tried at the September Term, 1906, Franklin County, *Watson, J.*, presiding. Divorce granted on the ground of adultery. The petitionee excepted to the judgment for that it was not warranted by the facts found by the court. The opinion sufficiently states the case.

Russell W. Taft and V. A. Bullard for the petitionee.

The rule in Vermont is that adultery must be proved by a preponderance of testimony, weighing the presumption of innocence in favor of the party accused. *Lindley v. Lindley*, 68 Vt. 421. "In an action for divorce on the ground of adultery, the presumption of innocence can only be rebutted by clear, convincing and pointed evidence; the charge being in effect a criminal one, and the defendant at the mercy of a witness." *Donnelly v. Donnelly*, 63 How. Pr. 481.

"The testimony of a private detective hired by the husband to watch his wife, with a view to learning facts upon which to base a suit for divorce, will be regarded with much suspicion, especially where it does not appear that his pay does not depend upon the successful effect of his evidence." *Blake v. Blake*, 70 Ill. 618; 2 Greenl. Ev. 16th Ed. 38, n.; 2 Bishop, Marr. Div. & Sep. §774; Stewart, Marr. Div. & Sep. §352; 9 Am. & Eng. Enc. 2d Ed. 413; *Derby v. Derby*, 21 N. J. Eq. 36; *Sopwith v. Sopwith*, 4 Swab. & Tr. 246; *Cioci v. Cioci*, 26 Eng. L. & Eq. 613; *Chapman v. Chapman*, 129 Ill. 386; *Moller v. Moller*, 115 N. Y. 468.

C. G. Austin & Sons for the petitioner.

The testimony tended to show adultery; its weight was for the trial court to determine, and that determination is not revisable. *Parsons v. Parsons*, 68 Vt. 95; *Benedict v. Champlain Glass Co.*, 11 Vt. 19; *Card v. Sargent*, 15 Vt. 393; *Emerson v. Young*, 18 Vt. 603; *Smith v. Day*, 23 Vt. 656; *Stevens v. Hewitt*, 30 Vt. 262; *West River Bank v. Gale*, 42 Vt. 27; *Durgin et ux. v. Danville*, 47 Vt. 95; *Kelton v. Leonard*, 54 Vt. 230.

TYLER, J. Petition for divorce for alleged adultery; petition sustained and bill granted; exceptions by petitionee for that the decree was based wholly upon circumstantial evidence, and that all the evidence produced by the petitioner did not warrant the decree.

1. That adultery may be proved by circumstantial evidence, both in civil and criminal cases, is well settled. The only gen-

eral rule that can be laid down upon the subject is, that the circumstances must be such as will lead the guarded discretion of a reasonable and just man to the conclusion that the alleged act was committed. 2 Greenl. Ev. §40. In 2 Bish. Marr. & Div. 1357, this rule is given: "Though no witness testifies to seeing the adultery, if there are proven facts consistent with the theory of its commission and inconsistent with any other theory, and if they create in the minds of the triers the degree of affirmative belief required by law, that it was committed, the evidence will be adequate." Kizer on Marr. & Div. §70. Bishop says in Vol. 2, §619, that when a criminal disposition by both parties and an opportunity to commit the act have been shown, adultery may be inferred. See *State v. Brink & Gibbs*, 68 Vt. 659.

In the present case the court found that adultery had been committed on two occasions, and evidence having been introduced tending to show other occasions when the parties were alone together in the room described, the court remarked that evidence as to other occasions was admissible, whether before or after the acts proved. We assume that from this evidence the court found an adulterous disposition, as it was admissible for that purpose.

2. It appears that all the evidence tending to show that the parties were in a certain room together on occasions came from persons who had been employed by the petitioner as private detectives. The rule as to the weight to be given to the testimony of persons thus employed is well stated in *Blake v. Blake*, 70 Ill. 618: "The testimony of a private detective hired by the husband to watch his wife, with a view to learning facts upon which to base a suit for divorce, will be regarded with much suspicion, especially when it does not appear that his pay does not depend upon the successful effect of his evidence." The other cases cited in the petitionee's brief are of the same effect, though some of them say that only slight credibility should be given to such witnesses; others go to the extent of holding that a bill should not be granted upon the unsupported testimony of such persons. But the correct rule is that such testimony is to be weighed and considered like other testimony and tried by the same tests, and the fact that a person is a hired witness should be considered by the triers. 9 Am. & Eng. Ency. 412; 2 Greenl. Ev. §46, n. It cannot be assumed that all the evidence was not fairly considered and weighed by the trial court.

It is held in this State that a conviction may be had in a criminal case upon the uncorroborated testimony of an accomplice. *State v. Potter & wife*, 42 Vt. 495; *State v. Dana*, 59 Vt. 614. As a rule, the testimony of private detectives is entitled to as much weight as that of accomplices.

3. There was evidence tending to show adultery. That its weight and sufficiency were for the trial court and cannot be revised by this Court has been repeatedly decided. *Kelton v. Leonard*, 54 Vt. 230; *Thayer v. Cen. Vt. R. Co.*, 60 Vt. 214; *Lewis v. Roby*, 79 Vt. 487. The rule is stated in *Lindley v. Lindley*, 68 Vt. 421, that the measure of proof required is a preponderance of the testimony, weighing the presumption of innocence in favor of the party accused. That this case was tried in accordance with the rule we have no reason to question.

Decree affirmed.

IN RE CAROLINE W. ROGERS' WILL.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed August 29, 1907.

Wills—Undue Influence—Confidential Relation—Pastor—Evidence—Presumptions as Evidence—Burden of Proof—Spoliation—Instructions.

In a proceeding to establish a will, contested on the ground of mental incapacity and undue influence, where it appeared that some years previous to the execution of the questioned will, the testatrix, and a sister and brother, both of whom she had survived, each made a will in favor of the other two, and the evidence tended to show that the testatrix erroneously supposed that, under those wills, the survivor would take the property of the other two, it was not error to allow proponent's witness to testify that he was present when

the three wills were executed and that then, in the presence of the testatrix, some one said that the survivor of the three was to inherit all their property, as showing a reason why the testatrix made no valuable bequests to her brothers, in connection with the clause in her will: "Because of a flaw in the wills of my brother George, and my sister Lucy, my brothers John and James have taken what I otherwise should have given them in this my last will, this is the true reason why I do not remember them more liberally in this will."

Proponent's witness testified that he attended the execution by the testatrix of a former will, drawn by him from notes furnished by her; that, in accordance with her request, he held that will till the one in question was filed in probate court, and then destroyed it; that he could not find the notes and thought he must have destroyed them, whereupon the court allowed him to give his recollection of their contents. *Held*, that the fair inference is that the court found the fact that the notes had been destroyed, which made admissible oral evidence of their contents.

In a proceeding to establish a will, made by an infirm woman about 74 years old, whereby she bequeathed nearly all of her property to several missionary societies and to her pastor, it appeared that her pastor had great influence over her, that he was deeply interested in the benevolent work of the missionary societies and had frequently urged them upon the attention of the testatrix; that about a year before the execution of the questioned will, he attended the execution by her of another will that he drew and which gave bequests to several of said missionary societies. *Held* that, in the circumstances, the law raised the presumption that the pastor did unduly influence the testatrix, and that this presumption not only cast upon the proponent the burden of showing lack of undue influence, but also established, *prima facie*, the existence of such undue influence, and was sufficient to defeat the will, unless that presumption, which was to be weighed as evidence in favor of the contestants, was overcome by counter proof; and that it was error to refuse a requested instruction to that effect.

The facts that the testatrix requested her pastor to retain the former will until he learned that a later one had been filed in probate court, and that when he learned that a later will had been so filed, he destroyed the former, do not involve the doctrine of spoliation, and the court properly refused a requested instruction on that subject.

APPEAL from a decree of the probate court establishing an instrument as the last will and testament of Caroline W. Rogers. W. H. Dean, proponent; John L. Adams and James W. Adams, contestants. Trial by jury at the June Term, 1906, Addison County, *Miles*, J., presiding. Verdict and judgment for the proponent. The contestants excepted. The contestants excepted to the failure of the court to comply with their eighth request for instructions, which was: "George H. Bailey was the actual and legal custodian of the will of Mrs. Rogers, executed, as he testifies, on July 23, 1904. As such, it was his duty, under section 2357 of the Vermont Statutes, within thirty days after he knew of the death of the testatrix, to deliver the will into the probate court, which has jurisdiction, or to the executor named in the will, if an executor was named. He had no lawful right to destroy or to consent to the destruction of that will, and the law made him liable to a penalty if he did not deliver the will as the statute directs. This law he is conclusively presumed to have known. That will was pertinent and admissible evidence in this trial, on the questions of the mental capacity of, and undue influence upon, Mrs. Rogers. The burning of it by Bailey and his wife, who are both parties in interest in the suit, was a spoliation of evidence which the contestants had a right to use in this trial, and such spoliation was unwarranted, wrongful and against law. Such spoliation gives the jury a right to infer that said will was of such a character that said Baileys believed that if used in evidence on this trial it would make against their interest. The fact that the contestants took the deposition of Cairn T. Bailey does not make her their witness, and they are not bound by her testimony. She is an adverse party, and they had a right under the statute to examine and cross-examine her as such party."

William H. Bliss for the contestants.

It was error to refuse contestants' eighth request. *Richardson v. Fletcher*, 74 Vt. 417, and 76 Vt. 206. "*Omnia presumuntur contra spoliatores*. When a party destroys or conceals evidence a presumption arises that if such evidence had been produced it would have been against the interest of the party destroying or concealing it, and such destruction or concealment becomes relevant." 2 Am. & Eng. Enc. 2nd Ed. 504; 2 Rapalje

& L. Law Dic. 1212; *Armory v. Delamarie*, 1 Smith's L. Cases (2nd Ed.) 356, 367; *Johnson v. Marx Levy & Bro.*, 109 La. 1036; 1 Am. & Eng. Enc. 2nd Ed. 671, note 4; *James v. Biou*, 2 Sim. & S. 600; *Eldridge v. Hawley*, 115 Mass. 410; Wig. Ev., §§285, 291.

F. W. Tuttle and *F. L. Fish* for the proponent.

The law is well established in Vermont that the particular points in the charge or the particular omissions in the charge must be indicated to the court in order to found an exception thereon. *Goodwin v. Perkins*, 39 Vt. 598; *State v. Brunell*, 57 Vt. 580; *Lynds v. Plymouth*, 73 Vt. 216; *Morrill v. Palmer*, 68 Vt. 1; *Jones v. Ellis*, 68 Vt. 544; *Dickerman v. Ins. Co.*, 67 Vt. 609.

The charge on the question of undue influence is supported by many decisions in this State. That a legacy would not have been made but for the suggestions of another does not prove incapacity or undue influence. *Foster's Exrs. v. Dickinson*, 64 Vt. 233; *Converse v. Converse*, 21 Vt. 168; *Thornton v. Thornton*, 39 Vt. 122; *In re Barney's Will*, 70 Vt. 352.

Where the testimony is conflicting a party cannot on special request, insist that the court shall collate certain conceded and certain disputed facts and isolating these facts from others which affect their force, make them the subject of a distinct branch of his charge to the jury as sufficient, if found, to authorize the jury to infer undue influence. It is enough if the court gives the jury the true rule as to what constitutes such undue influence as to invalidate the will. *Amsden v. Atwood*, 69 Vt. 528.

Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied. But it is not possible to say that any single circumstance or group of facts is the invariable mark of such a presumption, or that there is any uniform rule capable of application apart from the facts of each case. Wig. Ev., §2503; *Post v. Mason*, 91 N. Y. 539; *Carter v. Dixon*, 69 Ga. 82; *Bennett v. Bennett*, 50 N. J. Eq. 439; *Yardly v. Cushbertson*, 108 Pa. 395; *Lyons v. Campbell*, 88 Ala. 462;

Tyler v. Gardiner, 35 N. Y. 559; *Tibbe v. Kempe*, 54 S. W. (Mo.) 879; *Gardner, Wills*, 187.

Before the destruction of an instrument will be deemed a spoliation, it must be shown it was done *malo animo*, to injure the adverse party. *Delaney v. Tenison*, 3 Brown's Rep. 659. The presumption *contra spoliatores* does not justify the substitution of mere allegation or conjecture for proof. *Cartier v. Troy Lumber Co.*, 138 Ill. 533; *Ins. Co. v. Fire Ins. Co.*, 7 Wend. 31; *Arbuckle v. Templeton*, 65 Vt. 205.

TYLER, J. This is an appeal by the contestants from a decree of the probate court allowing an instrument as the last will of Caroline W. Rogers of Ferrisburgh. The allowance of the will was contested upon the pleas of the testatrix's mental incapacity and of undue influence exercised over her by George W. Bailey and his wife and daughter. These questions were submitted to the jury by special verdicts, were answered in favor of the proponents, and judgment was entered establishing the will. Two errors are assigned by the contestants in the rulings of the trial court admitting evidence. There are also exceptions to the omission of the court to comply with certain requests to charge and to portions of the charge as given.

The bequests are substantially as follows: \$500 to a nephew of the testatrix, \$200, \$200 and \$100 respectively, to three cousins, \$100 each to the respective wives of the testatrix's two brothers, \$100 to a friend, small amounts of furniture to the two brothers and small amounts of furniture and clothing to other relatives. There is a bequest of \$1,000 in trust for the support of one Geo. W. Smith during his life, with remainder, if any, to the Congregational Church Building Society. The other bequests are, \$1,000 each to the American Board of Commissioners for Foreign Missions, the Vermont Domestic Missionary Society, the Congregational Sunday School and Publishing Society and the Congregational Church of Ferrisburgh. It is provided in the last bequest that if that church ever ceases to exist, the bequest shall pass to the Vermont Domestic Missionary Society. There is a bequest of the use of the testatrix's house, with certain furniture therein and of about twelve acres of wood land, to Rev. Geo. H. Bailey and his wife and daughter during their lives, provided they occupy the house after they leave the parsonage, pay the taxes and insurance and keep the buildings in repair.

This bequest provides that upon the decease of said Baileys or upon their failure to comply with the above conditions said property shall pass to the American Missionary Association. The residue of the estate is given to nieces and nephews. The whole estate was worth between \$8,000 and \$9,000.

The testatrix was a widow 72 to 74 years of age when she made the instrument in question, had lived in Ferrisburgh nearly all her life—most of the time with her brother George and her sister Lucy, upon a farm which had been their father's and which they carried on together until the spring of 1903, when Mrs. Rogers moved to a house in the village, then owned by George, but which she purchased after his death in 1904. She presented claims against his estate to the amount of \$2,600 which were allowed. She also received from his estate, as his heir, about \$4,000.

The testatrix had been from her youth a member of the Congregational church at Ferrisburgh and for many years a teacher in its Sunday school. She was very sick in the spring and summer of 1904, and always after that was weak physically, and the contestants' evidence tended to show that she was mentally incompetent to make a will. The proponents' evidence tended to show that she was competent. She was avaricious and had never been a liberal contributor to any of the associations named in the proposed will, nor to the support of her church. She subscribed for and read the Congregationalist and other religious and missionary publications.

In July, 1892, the testatrix, her brother George and her sister Lucy, made their wills, each giving his or her estate to the others. The bequest in George's will was: "One-half thereof to my sister, Caroline A. Rogers, and the other half part thereof to my sister, Lucy Adams." The proponent introduced evidence tending to show that Caroline expected that the survivor of the three would take the property of the other two. When Lucy died her estate was distributed under her will to Caroline and the heirs of George. George died about two months later and his estate was distributed, one-half to Caroline, and the other half, as intestate estate, to his two brothers, the contestants, and said Caroline, as his heirs at law. After the death of George, Mrs. Rogers insisted that all of his property should go to her. She labored with the probate judge to make a decree to that effect, argued this point persistently with her friends

and neighbors and was never reconciled to the disposition of the estate as made.

1. The proponents produced a witness who testified under the contestants' exception, that he was present when the three wills were executed, that some person then said, in substance, in Mrs. Rogers' presence, that the survivor of the three was to inherit all their property. This evidence, though remote in respect to time, might, when considered in connection with what Mrs. Rogers said in the proposed instrument, afford a reason for making no valuable bequests to her brothers. A clause in the instrument is as follows: "Because of a flaw in the wills of my brother, George M. Adams, and my sister, Lucy A. Adams, my brothers, John Q. Adams and James M. Adams, have taken what I otherwise should have given them in this, my last will, this is the true reason why I do not remember them more liberally in this will. It is not from any feeling of ill-will, for I have the kindest of feelings toward them." There was no error in admitting this evidence.

2. It appeared that between May, 1904, and April, 1905, a Mr. Booth assisted Mrs. Rogers frequently in business matters and that she talked with him at length about making her will, saying that she wished to make provision for said Smith, who had been for a long time a family servant, and leave the residue of her property to her nieces and nephews, and said nothing about making bequests to the church or missionary societies. In the spring of 1905 she talked with Mr. Collins about drawing her will and said to him that she desired to give small legacies to friends and relatives and was going to make her nephews and nieces her residuary legatees, and said nothing about making any bequest to the church, to missionary societies nor to Rev. Mr. Bailey.

The contestant, John Q., is a farmer in Ferrisburgh and worth about \$4,000; the other contestant is worth but little property and is in poor health. The testatrix had a little trouble with John many years ago, but her relations with her two brothers and their families in recent years had been kindly, and with James and his wife and two sons her relations were intimate and affectionate.

Mr. Bailey was the pastor of the church of which she was a member, and was sixty-seven years old. He was the son of a lawyer, read some law books in his father's office and had had

experience in drawing wills and knew the requirements of the law for their proper execution. He testified that he drew and attended to the execution of a will for Mrs. Rogers in 1904, and that he and his wife and daughter witnessed it; that Mrs. Rogers gave him a memorandum from which he drew the will; that she wished to give \$500 to her nephew Geo. M. Adams, for his name, a thousand dollars to the Vermont Domestic Missionary Society, five hundred dollars to the American Board of Foreign Missions, one thousand dollars to the Congregational Sunday School and Publication Society, one thousand dollars to the Congregational Church of Ferrisburgh and one hundred dollars to a cousin, Miss Lura Kidder. Mr. Bailey testified that Mrs. Rogers gave no direction as to the disposition of the residue of her estate, but that he wrote in a gift of the residue to her two brothers, but that she objected, saying that they had enough, that she would not have their names in the will and directed him to tear off this bequest and write the attestation clause on the back of the sheet, which he did. He testified that this will was executed at the parsonage; that Mrs. Rogers took the will away with her but returned it in a few days and requested him to keep it for her and not destroy it until he knew that a later one, which she intended to make, had been filed in the probate court; that he retained it until after Mrs. Rogers' death, when, upon learning that another will had been filed, he caused the 1904 will to be destroyed; that no one but himself and his wife and daughter ever knew that that will was made. All the evidence respecting that will came from the witnesses thereto.

Mr. Bailey testified that Mrs. Rogers furnished him notes from which to draw the 1904 will, that he could not find them and thought he must have destroyed them, whereupon the court permitted him to testify to his recollection of their contents, to which the contestants excepted. We think the fair inference is, from what appears by the record, that the court found the fact that the notes had been destroyed, which made oral proof of their contents admissible; therefore this exception is not sustained.

Mr. Bailey denied that he advised any of the charitable gifts or the gift to himself and family in the contested will. He admitted, however, that he might have talked with Mrs. Rogers about gifts to missions; that he discussed these matters with members of his congregation; that he sought to get con-

tributions for these objects; that he meant to be faithful in this work of the church, and that "Mrs. Rogers was always speaking about missions." His house was very near hers and he passed hers in going to the post-office; that he called on her frequently as her pastor and spiritual adviser; that he attended to some business matters for her, including the repairing and painting of her house in the spring of 1905; "that their relations were, in one sense, very intimate"; that "Mrs. Rogers told him he would better not draw the will because he was a beneficiary under it." She advised with him about the bequests to himself and to Smith. He went over the will with her before it was completed and suggested that she had omitted the word "Congregational" in the bequest to the Church Building Society and showed her how to amend it. He knew and approved of all the provisions of the will before it was executed.

James M. Adams testified that Mrs. Rogers talked frequently with him in the summer of 1904, wished him to give up his residence in Kansas and come to Ferrisburgh with his family and live with her, said she wished to have the farm remain in the Adams family and intended that his son George should have it, that she intended to give all her property to her nephews and nieces. On one occasion she said that Mr. Bailey had told her that her brothers had no right to any of her property; that before his (James') return to Kansas it was arranged between Mrs. Rogers and himself that as soon as he could arrange his affairs in Kansas he would return to Ferrisburgh and comply with her request.

Mr. Dean, though not a lawyer, was experienced in drawing wills and in settling estates. Mrs. Rogers applied to him in April, 1905, to assist her in making a will and talked the matter over with him several times before the following August when it was executed. She supplied him with memoranda for the will, which he put together, and in July handed it to her completed and substantially like the will now offered, except that it did not contain a bequest to Mrs. Collins. In drawing the will he used nearly the language of the memoranda. He obtained of Mr. Bailey, at Mrs. Rogers' request, the names of the corporations that appear in the will. The testatrix told Mr. Dean that she should copy the will and afterwards told him that she had executed it.

It is evident that Mr. Bailey, by reason of his pastoral relations with Mrs. Rogers, had great influence over her. He was deeply interested in the beneficent work of the associations to which she gave nearly all her property. He discussed these causes with members of his congregation and testified that Mrs. Rogers was always speaking about missions, which obviously means that they talked them over together. He was doubtless diligent in obtaining gifts and legacies for the causes which these associations represent. This was a part of the work of the church and he intended to be faithful to it. No one can doubt from his own testimony that in 1904 and 1905 he frequently urged these causes upon the attention of Mrs. Rogers. It is apparent that he was active in procuring the will of 1904 to be made. He furnished the scrivener with the names of the associations for the present will and "went over it" with the testatrix to be sure it was correct and met his approval.

While we do not doubt that he acted conscientiously, we must remember that Mrs. Rogers had a severe sickness in the spring and summer of 1904, and that her mind was then disturbed, that in July of that year Mr. Bailey drew a will for her which contained bequests to several of the associations that appear in the will in controversy, that after that sickness she was always weak in body; also that there was evidence tending to show that she had at different times declared her purpose to leave her property to her relatives.

It is true that the jury found that Mrs. Rogers was competent to make this will and that she was not unduly influenced by Mr. Bailey, so the remaining question is whether the court submitted the case to the jury under such instructions as the contestants were entitled to.

In re White's Will, 78 Vt. 479, the facts were that the testator was a single man, eighty-nine years old, lived alone in his house, was intemperate and eccentric; he went to Shippee's house, four miles from his own, where he remained about three months, was taken sick while there and died. Shippee was his nurse and adviser. A few days before his death Shippee called to his house a scrivener, who wrote White's will and it was duly executed. Shippee was in the room near the testator when the will was executed; he paid the scrivener, directed one of the witnesses to take charge of the will of which he was made executor and sole legatee after paying White's needy son and

only heir five dollars. The estate amounted to \$4,300. There was a question whether White went to Shippee's intending soon to return home, or under a contract with Shippee to take care of him through his life for his property. The court instructed the jury that by reason of the relation that existed between the testator and the proponent, as above stated, and because the proponent took all the estate, the burden was upon him to show that he did not unduly influence the testator in making the will; that in the circumstances the law raised the presumption that Shippee did unduly influence White to make the will,—that that was the *prima facie* presumption which did more than to cast the burden of proof upon Shippee,—that it established *prima facie* the existence of undue influence and was sufficient to defeat the will unless that presumption was overcome by counter proof. The court so instructed because it held that the circumstances were such as to raise a suspicion against the will. The instructions given were in accordance with the well considered opinion in *re Cowdry's Will*, 77 Vt. 359. In *re Barney's Will*, 70 Vt. 352, where the relations between the testator and the proponent were confidential, and the proponent drew the will, taking a large bequest, when he would have taken nothing as heir, and needy relatives took nothing, this Court said that the law regarded the transaction with suspicion and cast the burden of proof upon the proponent to show that he did not unduly influence the testator.

In the present case the instructions on this point were as follows:

“The testatrix must have had sufficient mental capacity to execute a will, and it must have been her free act. In making out that it is such, it is incumbent upon the proponent to show by a fair balance of the evidence that it was so executed, and that the testatrix had the requisite capacity. And if you find that Mr. Bailey, her pastor, or his wife or daughter, had to do in counseling, or in causing the will to be written as it was written—it being uncontradicted that he was her pastor and spiritual adviser at the time the will was written, and a legatee of a considerable portion of her estate, then it would also be incumbent upon the proponent to prove by a fair balance of evidence that it was her free act, and that she was not unduly influenced to make it as it was made. But if you find that Mr. Bailey, his daughter or his wife, did not so counsel, or cause the

will to be written as it was written, then the burden of proving the undue influence rests upon the contestants, and they must show by a fair balance of the evidence that undue influence was used before you can find the undue influence as the contestants claim it. This inquiry as to whether Mr. Bailey, or his wife or daughter, caused the will in question to be written as it was, is important only as it bears upon the question upon whom the burden of proof lies respecting the question of undue influence; and the weight, if any, you may give to it, under all the circumstances in the case, as bearing upon the question of undue influence."

"You see by these instructions, Gentlemen of the Jury, that that question is important, not only as bearing upon the burden of proof, but it is also important as a piece of evidence upon the question of undue influence. If you find that fact, it does not establish that undue influence was had, but simply fixes the position of the burden of proof, and may furnish some evidence of undue influence, if the circumstances in the case warrant."

"To state more generally, the burden in any event, rests upon the proponent to prove the execution of the will and the mental capacity, and if you find that Mr. Bailey, his wife or daughter, caused the will in question to be written as it was written, then the burden of proof is upon the proponent to prove that it was not procured by undue influence. If you do not find that fact, then the burden is upon the contestants to prove that it was procured by undue influence, if they would avail themselves of that fact. The burden of proving that Mr. Bailey, his wife or daughter, caused the will in question to be written as it was written, or counselled it to be so written, and in consequence of such counselling it was so written, rests upon the contestants. And if that question is made out by that balance of proof, namely, that these parties did exercise, or did have to do with the writing of that will, the burden of proving the execution, the capacity, and that the testatrix was not unduly influenced, rests upon the proponents. But if that fact is not made out, then only the burden of proving the execution of the will and the capacity of the testatrix rests upon the proponents and the burden of proving the undue influence rests upon the contestants."

It will be readily seen that while the instruction was correct—that if the jury found that Mr. Bailey had to do with causing or counselling the will to be written as it was written the burden of proof was upon the proponents to show that it was without his undue influence—the jury were not told that that fact raised a suspicion against the will,—that from that fact the law raised a presumption of undue influence, which presumption was of itself a piece of evidence and must be overcome by counter proof. *Bradish v. Bliss*, 35 Vt. 326.

What appears in Mr. Bailey's own testimony as to his relations with the testatrix, his influence over her, what he did about this and the former will, with the fact that he took a large bequest—according to the instruction given in the White will case—established *prima facie* the presumption of undue influence and was sufficient to defeat the will unless it was overcome by other proof.

The court in the present case clearly stated to the jury the general rule of law in respect to undue influence, and that if they found a certain fact in the case the burden of proof would shift from the contestants to the proponents. The question is whether the instructions should have gone further upon the undisputed facts. As is said in Wig. on Ev., section 2503, it is not possible to say that any single circumstance or group of facts is the invariable mark of the presumption of undue influence, or that there is a uniform rule capable of application apart from the facts of each case.

We think the instruction should have been in substance as above indicated and that the omission was error. But a question is made whether the contestants have availed themselves of the error. It is true that no exception was taken to the charge as given upon the subject of undue influence, but a compliance with the contestants' sixth request would have met the requirement of the law, which request is:

"The jury are instructed that the relation sustained by Mr. Bailey to the testatrix (viz.: the pastor of her church and her spiritual adviser) was a relation of great trust and confidence, and if you should find that within a short time previous to the execution of the will in question, Mr. Bailey was frequently in conference with the testatrix alone, and was advising with her concerning said will and the disposition of her property by will, then the fact that Mr. Bailey was made a beneficiary

of a substantial estate, and various church and missionary societies in which Mr. Bailey was interested were also made beneficiaries to an extent comprising nearly the entire balance of the property of which the testatrix died seized—then you would be justified in presuming undue influence on the part of Mr. Bailey, subject to be rebutted by evidence that the will was the free and intelligent act of the testatrix.”

The contestants excepted to the omission of the court to comply with this request, therefore the question is properly before this Court.

3. The proponents state the rule correctly, as laid down in *Thornton's Exrs. v. Thornton's Heirs*, 39 Vt., at page 163, and in other cases, that a party cannot collate certain conceded and certain disputed facts, and, isolating them from others which would affect their force, request the court to instruct the jury that they may infer undue influence from them, if found. But here none of the facts stated in the sixth request were in dispute. They all appear in the will itself or were testified to by Mr. Bailey, therefore the rule invoked does not apply to this case.

4. Mr. Bailey testified that Mrs. Rogers requested him to retain the 1904 will until he learned that a later one had been filed in the probate court, and that when he learned that fact he caused the former will to be destroyed. Upon these facts the doctrine of spoliation does not apply here and there was no error in the court's refusal to comply with the contestants' requests upon this subject.

Judgment reversed and cause remanded.

CYNTHIA S. MEAD v. FRED A. OWEN.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed September 2, 1907.

Landlord and Tenant—Letting Farm on Shares—Incidental Occupancy of Tenement—Effect—Principal and Agent—Authority Conferred—Arbitrator—Witnesses—Competency—Husband and Wife—No. 60, Acts 1904.

It is essential to the maintenance of the action afforded by V. S. 1560, frequently called "justice ejectment," that the relation of landlord and tenant exist, and that the tenant hold possession of the premises after the termination of the lease, or after breach of a stipulation thereof by him or a person holding under him.

Under the ordinary contract for carrying on a farm "at the halves," the parties are tenants in common of the products of the farm, and the relation of landlord and tenant does not exist.

Plaintiff residing on a farm belonging to an estate of which she was administratrix, made an oral agreement with defendant, whereby he was to operate the farm on shares for a term of years, and as "a part of the agreement under which he occupied to carry on the whole farm," he was to occupy, free of expense, and have the exclusive possession of one of the tenement houses on the farm, plaintiff to continue to live in the farmhouse, and "neither party to interfere with the other in the exercise of such possession by each." *Held*, that defendant was not tenant of plaintiff in his occupancy of the house under the above agreement; that such occupancy was a mere incident to the operation of the farm on shares, in respect of which the relation of landlord and tenant did not exist; and that, therefore, the action given by V. S. 1560, frequently called "justice ejectment," would not lie to recover possession of the house.

An appointment as arbitrator and agent to settle differences with another, who had been occupying a house on a farm under an agreement whereby he was to carry on the farm on shares, does not

carry with it authority to extend the time within which the house may be occupied to the time of settlement.

Where, in an action of "justice ejectment" under V. S. 1560 to recover possession of a house, the defence was that defendant was trying to effect a settlement and was to vacate when the settlement was made, evidence by defendant's wife that she heard him say that he was willing to move, if he could get a satisfactory settlement, was not within No. 60, Acts 1904, forbidding a wife to testify against her husband as to any conversation had by him with her or with another person.

ACTION, under V. S. 1560, frequently called "justice ejectment," to recover possession of a dwelling house. Plea, the general issue. Trial by jury at the June Term, 1906, Addison County, *Miles, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. At the close of all the evidence "the defendant moved that the court direct a verdict for him on the ground that the testimony showed that the contract was a letting at the halves or on shares, creating a tenancy in common, so that the parties had a joint interest in the products and income of the farm, thereby creating a relation between the parties other than the relation of landlord and tenant; and the defendant further moved for a verdict on the ground that no reasonable notice had been shown to have been given the defendant to vacate the premises in question and that the court should direct a verdict for the defendant on these two grounds as a matter of law. The court overruled both motions, to which rulings the defendant excepted."

H. S. Peck and *F. L. Fish* for the defendant.

The summary remedy, known as justice ejectment, was enacted in England under II Geo. II C. 19, §16, in 1737, and has been adopted in nearly all the states. But the relation of landlord and tenant must exist under justice ejectment. 18 Am. & Eng. Enc. 437, note 1. In the ordinary letting at the halves the parties are tenants in common of the products of the farm. *Hunt v. Rublee*, 76 Vt. 448. This action of justice ejectment does not lie against one unless he is a technical lessee; when one takes a farm on shares he is not a lessee. *Wheeler v. Wheeler*,

77 Vt. 177; *Frost v. Kellogg*, 23 Vt. 308; *Warner v. Hoisington*, 42 Vt. 94.

Davis & Russell for the plaintiff.

Notice to quit is never necessary unless the relation of landlord and tenant subsists; nor where the party in possession repudiates such relation is notice to quit or demand of possession necessary. *Chamberlin v. Donahue*, 45 Vt. 50.

When a defendant in ejectment denies on trial his own tenancy, or requires proof thereof, he cannot insist on want of notice to quit as a defence. *Catlin v. Washburn*, 3 Vt. 25.

The court properly refused to direct a verdict. Even if the jury found that the letting was on shares the action would lie. None of the cases decided by this Court which are relied upon as holding that a letting upon shares does not constitute a lease, and that the parties are tenants in common of the crop, are in point. In none of these cases was anything but the title to the crop questioned. In such cases the parties may be tenants in common as to the products and not as to the land. She had a right to receive one-half the net income. She had no control over the products. The defendant was to sell and dispose of them. *McClellan v. Whitney*, 65 Vt. 510.

The ordinary contract of letting land upon shares creates the relation of landlord and tenant, the tenant having against the landlord as well as against others the possession of the land and the rights growing out of that relation. *Wentworth v. Railroad*, 55 N. H. 540; *Moulton v. Robinson*, 27 N. H. 550; *Clark v. Cobb*, 4 Greene (Iowa) 461; *Randall v. Chubb*, 46 Mich. 311; *Hurd v. Darling*, 14 Vt. 214; *Hadley v. Havens*, 24 Vt. 520.

The plaintiff claimed the defendant was wrongfully in possession of the tenement house which he occupied. Under the agreement the defendant was to have this house during the term free of rent or expense, and of this house it appeared that the defendant had exclusive possession. It was to recover possession of this house that plaintiff prosecuted her action. She did not claim to recover possession of the farm itself but only of the tenement house occupied by the defendant. The verdict was to recover possession of this house. The plaintiff had di-

vested herself of her control of the tenement house. The defendant had entered and was in exclusive possession, holding under his agreement with the plaintiff, and in subordination to her title. This is sufficient. 18 Am. & Eng. Enc. 605; *Branch v. Doane*, 17 Conn. 402; *Warner v. Abbey*, 112 Mass. 355; *Orcutt v. Moore*, 134 Mass. 48; *Herskell v. Bushnell*, 27 Conn. 43; *Doremus v. Howard*, 23 N. J. L. 393; *Walworth v. Jeness*, 58 Vt. 675.

In nearly all the cases in which arrangements like the one at bar have been brought before this Court, they have been treated as leases, and the terms "lessor and lessee," and "landlord and tenant" have been used by this Court in describing the arrangement and the parties. *Edson v. Colburn*, 28 Vt. 631; *Wilmarth v. Pratt*, 56 Vt. 474; *Smith v. Meach*, 26 Vt. 233; *Smalley v. Corliss*, 37 Vt. 486; *Hickok v. Buck*, 22 Vt. 149; *Brown v. Burrington*, 36 Vt. 41; *Blood v. Spaulding*, 57 Vt. 422; *Sowles v. Martin et al.*, 76 Vt. 180; *Hunt v. Rublee*, 76 Vt. 448; *Foss v. Stanton*, 76 Vt. 365.

If a person be placed on land as a mere occupier without any terms prescribed, he is strictly a tenant at will. 1 Taylor, Landlord and Tenant, 59; *Herrill v. Sizeland*, 81 Ill. 457; *Michael v. Curtis*, 60 Conn. 367; 24 Cyc. 1037; *Johnson v. Johnson*, 13 R. I. 467; *Danne v. Dame*, 38 N. H. 434; *Larned v. Hudson*, 60 N. Y. 104. The payment of rent is not an essential element of a lease. Any mutual advantage or detriment is sufficient.

TYLER, J. The plaintiff brought this suit under V. S. 1560, to recover possession of a certain dwelling house situated upon her farm, claiming that the defendant was holding over after the termination of a lease from her. The section of the statute relied upon reads:

"When the lessee of lands or tenements, whether the lease is by writing or parol, or when a person holding under such lease, holds possession of said demised premises without right, after the determination of the lease by its own limitation, or after breach of a stipulation contained in the lease by the lessee or a person holding under him, the person entitled to the possession of the premises may have from a justice a writ to restore him to the possession thereof."

The defendant contends that the relation of landlord and tenant did not exist between the plaintiff and himself and therefore that the case does not fall within the terms of this section.

It appeared that the plaintiff, as administratrix of her deceased husband's estate, resided upon a farm in Addison County, belonging to the estate, and that prior to March, 1902, she made an oral agreement with the defendant by which he was to occupy, free of rent or expense, one of the tenement houses situated on the farm and carry on the farm for a term of years, while the plaintiff was to continue to live in the farmhouse and use a portion of the horse barn. "His occupancy of the tenement house was a part of the agreement under which he occupied to carry on the whole farm." He was to have "the exclusive possession of the tenement house," and "neither party was to interfere with the other in the exercise of such possession by each."

Each party was to furnish certain things for the farm, and each was to have a sufficient amount of the produce for family use without accounting for it. It was a dairy farm, and it was agreed by the parties that the milk should be carried to a creamery and the checks received therefor divided between them.

The defendant was to sell everything that was produced and divide the profits with the plaintiff every month, and by "profits" it was meant that all the expenses incident to running the farm were to be deducted from the income and the remainder be divided monthly.

The plaintiff guaranteed the defendant \$35 a month above his expenses, and claimed that the agreement was for only two years from March 4, 1902. The defendant claimed that the agreement was that he should carry on the farm upon shares or at the halves until Mrs. Mead's daughter, then 13, should become of full age; that he was to have half the crops and half the income "in the usual way of figuring at the halves," and that he and the plaintiff were to make partial settlements from time to time. The defendant moved into the tenement house in March, 1902, and began work under the contract.

It appeared that the parties made several settlements and divided the net income; that in the second year some differences arose which they agreed to arbitrate; that on Feb. 28, 1904, they chose arbitrators who commenced their hearing one or two days afterwards, in the house now in suit, and had nearly

completed it, when, on March 6, the plaintiff revoked the agreement to arbitrate and on the following day brought this suit without previous notice to the defendant to vacate the premises. The defendant was then living in the house in question, taking care of the stock and produce, with the knowledge of Mrs. Mead and her agent. He then owned a half interest in the stock and produce and claimed a large balance his due on settlement.

The parties did not differ essentially in their respective versions of the agreement, for there is no legal distinction between dividing the products, each party selling his half, and one party selling the whole and dividing the money between them.

1. Under the decisions of this Court the plaintiff and defendant were tenants in common of the products of the farm. *Aiken v. Smith*, 21 Vt. 172; *Frost v. Kellogg*, 23 Vt. 308; *Willmarth v. Pratt*, 56 Vt. 474; *Willard v. Wing*, 70 Vt. 123. This doctrine is recognized in the recent cases of *Sowles v. Martin et al.*, 76 Vt. 180, and *Hunt v. Rublee*, Id. 448. But this is not determinative of the legal quality of the defendant's occupancy of the house, for though he carried on the farm and occupied the house under one agreement, he had the "exclusive possession" of the house, which precludes the idea of a tenancy in common.

2. The important question in the case is whether the relation of landlord and tenant existed between the parties, or whether the defendant's occupancy of the tenement house was not, under the contract, a mere incident to his carrying on the farm. If it was the latter this action will not lie, for this Court has uniformly held it essential to the maintenance of this form of action that the relation of landlord and tenant must exist, and that this remedy can only be resorted to when the tenant holds possession of the premises after his right to occupy has terminated. *Pitkin v. Burch*, 48 Vt. 521; *Baldwin v. Skeels*, 51 Vt. 121; *Barnes v. Tenney*, 52 Vt. 557; *Horan v. Thomas*, 60 Vt. 325.

The questions involved require a consideration of the authorities upon the subject of incidental occupancy.

In *Hughes v. Overseers of Chatham*, 5 M. & G. 54, the question was whether a master ropemaker occupied a certain house in the royal dockyard as tenant, or as a servant of his employer, as affecting poor-rates and his right to vote. The

house belonged to the lords of the admiralty. Hughes paid no rent for the house, but occupied it as a part remuneration for his services. If he had not had the house he would have had an allowance for a house in addition to his salary.

Tindal, C. J., held that a master might pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; but that a servant might occupy a tenement of his master, not by way of payment for his services, but for the purpose of performing them; "that he might not be *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but *required* to occupy in the performance of his contract to serve his master"; * * * that "as there was nothing in the facts stated to show that the claimant was *required* to occupy the house for the performance of his services, or did occupy it *in order* to their performance, or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his services, and, as the case expressly finds that he had the house as part remuneration for his services, we can not say that the conclusion arrived at by the revising barrister is wrong." The revising barrister had found that the plaintiff occupied the house as tenant.

A distinction is thus clearly drawn between the occupancy of a house as an incident of the occupant's employment, it being immaterial to him whether he occupy that house or another at the employer's expense, and an occupancy that is for the employer's benefit. Of the former class is where a man is employed in a public office and is allowed to live in a house upon the premises belonging to the government. It is not considered the dwelling house of the occupant. The same is true where the occupier is a servant of a public company. See cases cited in plaintiff's brief in *Hughes v. Overseers*. The same rule was applied in *Chatard, Bishop v. O'Donovan*, 80 Ind. 20, where a priest, holding his place at the will of the bishop of the diocese, occupied the church property, including a dwelling house. As his occupancy was connected with the service and was required for the better performance of it, it was therefore held to be that of a servant and not that of a tenant.

A nobleman, for instance, would have, attached to his manor, a coachman's house and a gardener's house. His coachman and

gardener would be expected to occupy their respective houses for his convenience and on account of their location with reference to the work to be performed. As Lord Mansfield said in *King v. Stock*, 2 Taunt. 340: "Many servants have houses given them to live in, as porters at park gates; if a master turns away his servant, does it follow that he cannot evict him till the end of the year?" In such cases it is clear that the occupancy is a mere incident of the employment and does not partake of the nature of a tenancy.

In *Davis et al. v. Williams*, 130 Ala. 530, 89 Am. St. Rep. 55, Williams built a house for the Davises on their land and occupied it about two years while he was "looking after business" for them. Apparently nothing was said about rent until the end of two years, when Williams began to pay five dollars a month as rent. It was held that his occupancy of the house for the two years, being for the purpose of looking after the business of the other parties, did not create the relation of landlord and tenant, but was that of employer and employee, or of master and servant; that it was a part of the contract for service and operated as a portion of the consideration of the agreement.

Haywood v. Miller, 3 Hill 90, is often cited upon this question. In that case the defendant hired the plaintiff to work on the defendant's farm for a year and the plaintiff's wife to do housework. There was a dwelling house on the farm into which the plaintiff moved with his family. Some differences arose between the parties, and the defendant entered the house and put the plaintiff out of it. The Supreme Court said that it was assumed by the contract that the defendant should furnish a house for the plaintiff, "that every master agrees to furnish a house, or house-room, which is the same thing, for his domestic servants"; held, that the relation of the parties was that of master and servant.

It is apparent from the foregoing authorities that whether the occupancy of a house is, in a given case, that of a tenant or of a servant or employee, depends upon the language of the agreement and the attending circumstances. As Church, C. J., said in *Kerrains v. People*, 60 N. Y. 226, the question depends upon the nature of the holding, whether it is exclusive and independent of and in no way connected with the service, or whether it is so connected, or is necessary for its performance.

In that case the plaintiff in error agreed to work for a year for Son in his mill at thirteen shillings a day and have the use of a house that belonged to the mill property, the same house that he had before occupied. Son, for cause, discharged the plaintiff, ordered him out of the house and went with men to throw out his furniture. The question was whether the plaintiff was in occupancy as a tenant or as a servant; held that the occupancy was incidental to the employment. The case was precisely like *Chatard v. O'Donovan, supra*. In such cases the occupancy is clearly incident to the employment, that is, dependent upon it, appertaining to it, so that the idea of remuneration does not enter into the case.

The tests are clearly stated in 24 Cyc. 880: Where an agent is placed in possession of premises, by the owner, for the management thereof, he is not a tenant; nor where an employee is allowed to occupy his employer's premises does he become a tenant in case the employer has general control and supervision over the premises so occupied; nor does the employee become a tenant where his occupancy is connected with the service, or is required by the employer for the necessary or better performance of the service. "But," says the writer of the text, "where the control is parted with, the tenant will not be regarded as occupying as a servant or agent, although other circumstances may point to such relation." The same rules are given in 18 Am. & Eng. Ency. 171. These rules seem to be established by abundant authority.

This question is well considered in *Bowman v. Bradley*, 17 L. R. A. 213, (Pa.). There it appeared that the defendant owned a farm and hired the plaintiff and his family to do certain kinds of work upon it, for which, by the agreement, the plaintiff was to receive one dollar a day and the use of a house upon the premises to be occupied by himself and family. In an action of trespass for an alleged wrongful ejectment the question was about the duration of the contract, the plaintiff claiming it was for a year, the defendant, that it was terminable at his pleasure. The court said that while the terms of the contract, so far as the parties differed, were for the jury to determine, the terms being fixed, their legal import was for the court to declare, and laid down the rule that the occupancy of a house by a farm hand and his family, who are hired to do work connected with

the farm for a certain price per day and the use of the house to live in, is incidental to the employment, and the right thereto ceased with the service. The court followed the English cases, holding that the plaintiff had no independent right of possession, that his possession of the house, land, animals and farming implements was the possession of his employer; that it was "an incident of the hiring," and "must fall with the principal." The occupancy was likened to that of a porter to a porter's lodge; to that of domestic servants to the rooms which they occupy in the house of their employer.

Applying these rules to the present case, was the defendant a tenant of the plaintiff in the occupancy of the house, or was his occupancy of it a mere incident to his carrying on the farm?

Church, C. J., in the opinion referred to, quoted from the opinion of Tindall, C. J., in *Hughes v. Overseers*, because as he said, "it lays down concisely the correct rule for determining the question involved in this class of cases." In that opinion, as we have shown, the English Chief Justice made the essential requirements of an incidental occupancy that it was necessary that the employee should occupy the house for the performance of his services, or did occupy it in order to their performance, or that it was conducive to that purpose more than any house that he might have hired.

In the present case it appears that this tenement house was on the farm and that it was agreed that the defendant should occupy it free of rent. It cannot be said that it was immaterial to him whether he occupied this house or another that he might hire at the plaintiff's expense, for the case does not show that another house was available. This one, situated upon the farm, would, presumably, be more convenient for the defendant in that employment, than one more remote, so that in this sense his employment required his occupancy of this house. It is fairly inferable from what appears that both parties considered that the defendant's occupancy of this house was more conducive to his employment than any other one would be, if, indeed, another was available. This brings the case within the rules laid down by Tindall, C. J.

It was of course competent for the parties to have created in one contract the relation between them of tenants in common as to the products of the farm and that of landlord and tenant

as to the house occupied by the defendant. He might have been a lessee of the house, whatever his relation to the farm and crops, and that without an agreement to pay rent. But the fact that there was an express agreement that he should not pay rent tends to show that the parties regarded the occupancy as incident to the employment; at all events this was the legal effect of the agreement. This construction gives effect to the words, "The occupancy of the tenement house was a part of the agreement under which he occupied to carry on the farm." The defendant's possession was, in law, the possession of the plaintiff.

In accordance with the views above expressed we hold that the relation of landlord and tenant did not exist between the plaintiff and the defendant in respect to the house, and that, as this relation must exist and there must be a wrongful holding over by the tenant after the termination of his lease, this form of action is not applicable to the case. The defendant's motion for a verdict should have been granted.

The defendant testified that he was induced to sign the arbitration agreement by the promise of the plaintiff's agent, Brownell, that, if he would sign it, he might remain in the house until a settlement was made. If this were a fact the suit was prematurely brought. Brownell denied making the promise and the plaintiff denied his authority to make it. It is unnecessary to decide whether a naked promise by the plaintiff to temporarily extend the defendant's term of occupancy precluded her bringing a suit without notice to the defendant to vacate. It is sufficient to say that the court submitted to the jury the precise question raised by the testimony—whether there was an extension of time in consideration of the defendant's signing the agreement. The jury evidently did not find such promise. There was no error in this instruction.

The court also properly submitted to the jury to find whether—if they found that Brownell made the promise—he had authority to make it. His appointment as arbitrator and agent to settle with the defendant did not carry with it authority to extend the tenancy.

The plaintiff's evidence tended to show that prior to March 4, 1906, the defendant had several times announced his intention not to remain on the farm after that time, and that on one occasion he notified plaintiff that he would not remain after

March 4. The defendant's wife was introduced by him as a witness and testified about conversations that she had heard her husband have with other persons. On cross-examination by the plaintiff she testified that she had several times heard him say that he was willing to go if he could get a satisfactory settlement, and that for a time she heard him say this every day. Under No. 60, Acts of 1904, a wife cannot testify against her husband as to any conversation made by him to her or to another person. But it does not sufficiently appear that Mrs. Owen's testimony was against her husband. On the contrary, it seems to have been in the line of his defence—that he was trying to effect a settlement and that he was to move when the settlement was made. Error is not predicable upon the admission of this testimony.

Judgment reversed and cause remanded.

LEONARD L. MORGAN v. LYMAN HENDRICK AND WALTER HENDRICK.

May Term, 1907.

Present: ROWELL, C. J., TYLER, and MUNSON, JJ., and TAYLOR, SUPERIOR J.

Opinion filed September 6, 1907.

Animals—Vicious Horse—Action for Injuries—Master and Servant—Contributory Negligence—Evidence—Previous Vicious Acts—Photographs—Surgeons—Cross-Examination—Instructions—Motion in Arrest—Scope.

The extent of cross-examination, when no rule of law is violated, is within the discretion of the trial court.

In an action for injuries resulting from a kick by defendant's horse while plaintiff was raking hay therewith, based on the allegation that, to defendant's knowledge, the horse had the habit of kicking,

plaintiff was entitled to show previous acts of viciousness, although it appeared that plaintiff received the injuries complained of while he was using the horse as defendant's servant.

Photographs of the horse standing hitched to a carriage, offered to show its conduct in harness and its general disposition and character, were properly excluded, as they had no tendency to disprove the habit complained of.

Defendant's evidence having tended to show that plaintiff and his brother went to a fair two years before with the horse in question hitched to a specified wagon, it was proper to allow plaintiff's witness to testify in rebuttal that four years previously he loaned his horse to plaintiff and his brother to go to the fair with that wagon, plaintiff's brother having later testified that he and plaintiff went to the fair but once with that wagon, and then had said witness's horse.

In an action to recover damages for a broken leg caused by a kick from defendant's horse while plaintiff was raking hay therewith, a surgeon having testified in plaintiff's behalf that the lower fragments of the bones of plaintiff's leg at the point of fracture were nearer together than they naturally were, caused by the breaking and setting of the limb, it was error to restrict the cross-examination so as, in effect, to exclude the question, "How much nearer together are the bones of that leg at the point of fracture than they were before the fracture?"

Evidence that plaintiff, while riding a horse-rake drawn by the horse in question, kicked the horse, whereupon the horse kicked him, inflicting the injuries of which he complains, nothing more appearing, does not tend to show misconduct that will bar recovery.

Defendant's requested instruction that, if the jury should find that plaintiff had had a previous opportunity to observe and know the horse and its habits and traits, and did so observe and know them, he could not recover, was too broad, and it was not error to refuse it.

Judgment is never arrested except for matters apparent on the face of the strict record; hence a motion in arrest of judgment, based on matters revealed by the evidence only, was properly overruled.

CASE for injuries resulting from keeping a vicious horse. Plea, the general issue. Trial by jury at the September Term, 1906, Franklin County, *Watson, J.*, presiding. At the close of

all the evidence the court directed a verdict for defendant Lyman Hendrick. Verdict and judgment for the plaintiff against Walter B. Hendrick, who excepted. The opinion states the case.

W. H. Fairchild and Elmer Johnson for the defendant.

The court erred in so restricting defendant's cross-examination of plaintiff's surgeon as to exclude the question, "How much nearer together are the bones of that leg at the point of fracture than they were before the fracture?" The right of cross-examination is a legal right. If no opportunity is offered for cross-examination, the testimony taken on direct examination must be stricken out. 2 Wig. Ev., §1390; 1 Greenl. Ev., §445; 8 Am. & Eng. Enc. Pl. & Pr. 98; *Stiles v. Estabrook*, 66 Vt. 535; *Langley v. Wardsworth*, 99 N. Y. 61.

The photographs were admissible both to show that the horse was quiet in harness, and to show its general disposition. 1 Wig. Ev., §792; 22 Am. & Eng. Enc. 772; *Pritchard v. Austin*, 69 N. H. 367.

The court erred in refusing defendant's requested instruction. "If the jury find that the mare kicked the plaintiff and such kicking was caused by plaintiff's abuse, misuse, or ill-treatment of the mare, plaintiff will be said to have brought the injury upon himself, and cannot recover." A person who irritates an animal, and is bitten or kicked in turn, is deemed to have proximately caused the damage sustained, and so cannot recover. Bigelow, Torts, 274; *Cogswell v. Baldwin*, 15 Vt. 405; *Werner v. Winterbottom*, 1 N. Y. Supp. 417; *Muller v. McKesson*, 73 N. Y. 195; *Marble et al. v. Ross*, 124 Mass. 44; *Nickerbocker Ice Co. v. Finn*, 80 Fed. 483.

C. G. Austin & Sons for the plaintiff.

The evidence of previous vicious acts was properly received. Under the issue as made, it was for the jury to say whether the horse was vicious and had a propensity to attack and kick mankind. By pleading the general issue the defendant denied that the animal was vicious and denied knowledge of the same. The only proper way to show the affirmative of this proposition would be by evidence of the animal's character previous to the injury.

Arnald v. Norton, 25 Conn. 92; *Kittredge v. Elliot*, 16 N. H. 77; *Fake v. Addicks*, 45 Minn. 37; *Rider v. White*, 65 N. Y. 54; *Kennon v. Gilmer*, 131 U. S. 22; *Dover v. Winchester*, 70 Vt. 421; 1 Wig. Ev., §201.

The extent of cross-examination to test the accuracy, veracity, or credibility of a witness, is within the discretion of the trial court. *State v. Fournier & Cox*, 68 Vt. 270; *McGovern v. Hays & Smith*, 75 Vt. 108; *Hathaway v. Goslant*, 77 Vt. 199; *State v. Bean*, 74 Vt. 111; *State v. Plant*, 67 Vt. 459; *Miller v. Smith*, 112 Mass. 476; 8 Enc. Pl. & Pr. 109, 110.

Defendant's requested instruction, as to the result if the jury should find that plaintiff kicked the horse, was not warranted by the evidence and, hence, was properly denied. *Winchell v. Express Co.*, 64 Vt. 15; *Winn v. Rutland*, 52 Vt. 481; *Weeks v. Lyndon*, 54 Vt. 638; *State v. Bradley*, 64 Vt. 466.

The motion in arrest of judgment was properly overruled, because the same is based upon evidence in the case and is not directed solely to defects appearing in the declaration. Nothing is better settled than that on a motion in arrest for insufficiency of the declaration, only the declaration itself and the subsequent pleadings that may, and sometimes do, help out, can be looked into. *Baker v. Sherman & Miller*, 73 Vt. 26; *Harding v. Cragie*, 8 Vt. 501. The declaration is good, containing every element essential to a recovery. There was no need of any averment of negligence in the declaration. As said by Lord Denman, C. J., in delivering the judgment of the court in *May v. Burdett*, 2 Q. B. 101: "Whoever keeps an animal accustomed to attack and bite mankind, with the knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of the person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of. The gist of the action is the keeping of the animal after a knowledge of its mischievous propensities." *Brown v. Carpenter*, 26 Vt. 638; *Oakes v. Spaulding*, 40 Vt. 347.

MUNSON, J. The plaintiff, a laborer in the employ of the defendant, had his leg broken while alone in the field raking hay with defendant's horse, and claimed that the injury was caused by the horse kicking him while he was on the rake, and

sought to recover on the ground that the horse had the habit of kicking and that this was known to the defendant.

It having appeared that the relation of master and servant existed between the parties at the time of the injury, the defendant objected to all evidence of previous acts of viciousness. The facts that the plaintiff was the servant of the defendant, and was using the horse in work he was employed to do, were not sufficient to relieve the defendant from liability; and the evidence was properly received.

After a reasonably long and comprehensive cross-examination of the witness Wood as to collateral facts bearing on the question of his presence on a certain occasion, the court directed counsel to suspend the inquiry. This was a legitimate exercise of its discretion. *State v. Bean*, 74 Vt. 111, 52 Atl. 269.

The photographs showing the horse hitched to a carriage and standing at rest, offered to show its conduct on two different occasions while in harness, and again to show its general disposition and character, were properly excluded. They had no tendency to disprove the habit complained of.

The defendant introduced evidence tending to show that the plaintiff and his brother went to a fair two years before with the horse in question hitched to the wagon of one Sturgess. In rebuttal, the plaintiff called one Gould, who was permitted to testify under exception, upon plaintiff's promise to make a further connection of the evidence, that he loaned his horse to the plaintiff and his brother to go to the fair with the Sturgess wagon, and that this was four years before, and was the only such occasion. Defendant thereupon moved that this testimony be stricken out, because it did not rebut the point made by his evidence, which motion was overruled and an exception allowed. The plaintiff then produced his brother, who testified that they went to the fair but once with the Sturgess wagon and then had the Gould horse. The testimony of Gould was admissible in connection with this evidence.

A surgeon produced by the plaintiff testified that the lower fragments of the bones of plaintiff's leg at the point of fracture were nearer together than they naturally were, caused by the breaking and setting of the limb; and that this had disturbed the location of the bones in the ankle and foot, and would cause permanent lameness. Upon cross-examination the defendant

asked: "How much nearer together are the bones of that leg at the point of fracture than they were before the fracture?" This was objected to because it assumed that the doctor knew the distance between the two bones before the fracture. The court did not pass upon the question directly, but said, "he can only give his opinion of it." Counsel then said: "May I ask him if he knows they were nearer together?" To which the court replied: "No, because that is a matter he could not know." Defendant excepted to these rulings.

The question asked was proper. It was in effect excluded, and the exclusion is covered by the exception. It is said in argument that there was no evidence that the doctor had ever seen the plaintiff's leg before the injury, and that the court's statement in the presence of the jury that this was a matter he could not know about benefited the defendant as much as if testified to by the witness. But these suggestions do not meet the difficulty. The witness spoke as one having some knowledge of the relative position of the bones before the injury when he testified that they were now nearer together. His direct evidence was based on the assumption that the bones were originally in normal position, and the defendant was entitled to propound inquiries on the same assumption. The natural position of the bones was a matter of scientific knowledge. The course taken restricted the cross-examination upon a subject of vital importance.

A witness for the defendant testified that the plaintiff told him, in accounting for the accident, that he kicked the horse and the horse kicked him. In view of this evidence the defendant requested an instruction that if the kicking by the horse was caused by the plaintiff's abuse, misuse or ill-treatment of the horse, he must be said to have brought the injury upon himself and cannot recover. The request was properly refused. Evidence that one riding a horse-rake in operation kicked the horse in front of him, nothing more appearing, is not evidence tending to show conduct that will bar recovery.

There was evidence that the plaintiff had had some previous opportunity for observing the horse, and had once driven it into Canada, having the entire charge of it for over two days. The defendant requested a charge that if the jury should find that

the plaintiff had had an opportunity to observe and know the horse and its habits and traits, and did so observe and know them, he could not recover. Whatever the law may be as to the effect of plaintiff's knowledge of the vicious habit complained of, a charge in the words of this request would have been too broad, and it was not error to refuse it. There was no exception to the charge as given.

The motion in arrest was properly overruled. It was based on the existence of the relation of master and servant—a fact disclosed by the evidence. The only questions reached by motion in arrest are those apparent on the face of the record.

Judgment reversed and cause remanded.

O. R. MASON v. HENRY WARD, ET AL.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed September 19, 1907.

*Confession Judgments—Necessity of Agreement—Compelling
Creditor to File Specification—V. S. 1048—Construction.*

A judgment based on a confession made by a debtor without the request or consent of the creditor, and entered at the instance of the debtor alone, is void unless the creditor ratifies or accepts it.

Judgments on confession without antecedent process are based exclusively on the statute; a full compliance with the statutory requirements is necessary to their validity; and the provisions authorizing them are to be strictly construed.

Under V. S. 1048, providing that "a justice may accept and record a confession of debt to a creditor, made by a debtor personally, either with or without antecedent process, as the parties shall agree, and render judgment on such confession; but such judgment

shall not be rendered except upon a specification in writing filed with the justice, setting forth the claim upon which the judgment is rendered," a judgment without antecedent process can be rendered only by agreement of the debtor and creditor; and the clause requiring the creditor to file a specification of his claim assumes that a judgment has been agreed upon, and is designed merely to insure a statement of the cause of action to be merged therein, and no authority exists to compel the creditor to file such specification.

PETITION for a writ of prohibition, brought to the Supreme Court for Chittenden County at its May Term, 1907, and then heard on demurrer to the petition. The opinion states the case.

Russell W. Taft for the petitionee.

If the clause "as the parties shall agree" were meant to apply to the power itself to confess judgment, it would follow the word "creditor," and "if" would have been substituted for "as." This would be especially the case if we adhere to the English common law doctrine that punctuation marks are merely a contrivance of the printer, and no part of the statute. 26 Am. & Eng. Enc. 631. But punctuation has been at least once considered, *McPhail v. Gerry*, 55 Vt. 174, as a means of determining the meaning of a Vermont statute. See *Henry v. Estes*, 127 Mass. 474.

The rule that the court first acquiring jurisdiction will retain it throughout does not apply to the case at bar. The purpose of that rule is not involved. Further, V. S. 1048, is an enabling act that abrogates the common law, as far as it goes, and imports no conflict of authority. Power is simply given to a certain official to perform one function of another court. 12 Enc. Pl. & Pr. 151.

V. A. Bullard for the petitioner.

Any judgment rendered by the justice could not be questioned afterwards by either party; so the creditor's only remedy is a writ of prohibition. *Bullard v. Thorpe et al.*, 66 Vt. 599; *Hubbard v. Fisher*, 25 Vt. 539; *Shedd & Co. v. Bank of Brattleboro*, 32 Vt. 709; *Farr v. Ladd*, 37 Vt. 156; *Coxen v. Burton*,

27 Cal. 228; *Bank v. Mather*, 30 Iowa 283; *Martin v. Judd*, 60 Ill. 68.

MUNSON, J. The case is presented by a demurrer to a petition for a writ of prohibition. It appears that the defendant Ward, while confined in jail on a writ sued out by the petitioner and then pending in county court, applied to defendant Stearns, a justice of the peace, for leave to come before him, and confess judgment on the petitioner's claim; that the justice took jurisdiction of this application, and ordered the petitioner to file a specification of his claim, and to be present at the taking of Ward's confession of indebtedness; that these orders were made without the knowledge or consent of the petitioner, that he was unable to furnish a specification, and objected to doing it, and also objected to the entire proceeding; and that the justice now threatens to enforce his orders by proceedings for contempt.

The statute provides that "a justice may accept and record a confession of a debt to a creditor, made by a debtor personally, either with or without antecedent process, as the parties shall agree, and render judgment on such confession"; but that "such judgment shall not be rendered except upon a specification in writing filed with such justice, setting forth the claim upon which the judgment is rendered." V. S. 1048.

The defendants contend that the clause, "as the parties shall agree," applies only to the clause, "either with or without antecedent process"; that the right given the debtor to confess his indebtedness is not left dependent on the consent of the creditor; that the confession is authorized as the basis of a judgment, and is of no benefit to the debtor unless judgment is had; and that inasmuch as the judgment cannot be entered without a specification, the statute impliedly gives the magistrate the power necessary to procure the specification. We consider these views untenable.

Judgments on confession without antecedent process have no basis other than the statute, and a full compliance with the statute is necessary to their validity, and the provisions authorizing them are to be strictly construed. 11 Ency. Pl. & Pr. 975; 23 Cyc. 669; 17 A. & E. Ency. Law 765; and cases cited. A judgment based upon a confession made without the request or con-

sent of the creditor, and entered at the instance of the debtor alone, will have no validity unless the creditor ratifies or accepts it. 23 Cyc. 703; 17 A. & E. Ency. Law 767; 11 Ency. Pl. & Pr. 981; and cases cited.

We find no justification in the language of our statute for a construction that would make the proceeding compulsory. The effect of the provision regarding an agreement cannot be confined as defendants claim. If there is no agreement for a judgment without antecedent process there is no basis for the judgment. If the judgment is to be by agreement, the agreement necessarily involves the amount of it. It is clear that the creditor could not be compelled to accept a judgment for less than he claimed, and it certainly was not intended to provide for the rendition of a judgment that would not be binding on the creditor. It is true that if the creditor files a specification of his claim, and the debtor confesses an indebtedness of that amount, the parties will have agreed on the judgment rendered; but this result cannot be reached by compelling the creditor to file a specification. No authority for this can be deduced from the clause requiring a specification before judgment. This clause assumes that a judgment has been agreed upon, and is designed merely to insure a statement of the cause of action to be merged in it.

It is said, however, that this construction of V. S. 1048 will render inoperative V. S. 1690. The section last named provides that if a debtor, before or after suit commenced, tenders to the creditor a confession of judgment before a justice for the amount of the debt and costs then accrued, and such tender is refused, the creditor shall not recover the costs made after such tender in procuring judgment for his debt. It is argued that "if the consent of the plaintiff is necessary before a judgment can be confessed, it would be impossible to procure a confession of judgment to tender." But what is here spoken of is not the tender of a judgment in being, or of anything having the force of a judgment, but an offer to give judgment, which may be refused, and which, if refused, leaves the judgment still to be obtained.

The provisions of V. S. 1048 and 1690 were originally embodied in one section, and remained so until the revision of 1839, when they were given their present form. There was no provision in the earlier statute that made the rendition of the judg-

ment depend on the filing of a specification. What is called in the original act a confession of debt is there given the force of a judgment, for it is provided that on making a record thereof execution shall issue. The statute now provides in terms for the rendition of a judgment on the confession. The first part of the original section authorized judgments on confession, and directed the course to be taken when the confession of indebtedness was agreed to; and the last part prescribed the effect to be given to a tender of such a confession if it was refused. We find nothing in the statute as originally framed, or as it now stands, to indicate the legislative intent contended for by the defendants.

This disposes of the only ground on which the right to the writ is questioned.

Demurrer overruled, petition adjudged sufficient, and case held for further proceedings.

HENRY A. HATCH v. O. W. REYNOLDS' ESTATE.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed October 5, 1907.

Master and Servant—Injury of Servant—Extraordinary Danger—Assumption of Risk—Burden of Proof—Evidence—Sufficiency—Directed Verdict.

In an action by a servant against his master for injuries resulting from an extraordinary danger, the burden is on plaintiff to show that he did not assume the risk, and to do that, he must show that he did not comprehend it, and that it was not so plainly observable that the law will charge him with having comprehended it.

In an action against a testator's estate for injuries alleged to have been received by plaintiff because of the testator's negligence in sending him to repair the testator's reservoir, which contained a walk, known to the testator, but unknown to plaintiff, to be unsafe, and which fell with plaintiff upon it, whereby he was thrown into the reservoir and hurt, the testimony of plaintiff's wife that she did not know of his working on the reservoir before the accident, there being no ground to infer that she would have known it if he had, did not tend to show that plaintiff never worked on the reservoir before, and so warrant the inference that he did not know of the condition of the walk because of lack of opportunity; and that being the only evidence relied on as tending to show that plaintiff did not assume the risk, a verdict was properly directed for defendant.

APPEAL from the disallowance by the commissioners of a claim presented against the estate of O. W. Reynolds by Henry A. Hatch. Declaration in case for personal injuries caused by the testator's alleged negligence. Plea, the general issue. Trial by jury at the December Term, 1906, Lamoille County, *Miles*, J., presiding. At the close of plaintiff's evidence, the court directed a verdict for the defendant for that there was no evidence tending to show that the plaintiff did not assume the risk by voluntarily encountering the danger after he comprehended it. The defendant excepted.

The plaintiff's evidence tended to show only that from October, 1890, to the time of the accident plaintiff was employed by the testator as a clerk in his store; that on July 12, 1898, and for some years previous thereto, the testator owned a water reservoir in the village of Cambridge, Vermont, which was covered by a roof extending to the ground; that beneath this roof a plank walk extended from east to west over the reservoir about in its center; that on July 12, 1898, the testator sent his son and plaintiff to do something in respect of that reservoir, but it did not appear what; that thereupon those two went to the reservoir, and while they were standing together at the west end of said walk, it fell and threw plaintiff into the reservoir and severely injured him; that either the cleat which supported that end of the walk "had rotted off or the nails had rusted and pulled off"; and that immediately after the accident, the

testator said to plaintiff, "I am sorry I sent you up there, if I could have got anyone else I wouldn't have sent you."

V. A. Bullard and B. E. Bullard for the plaintiff.

The unexplained giving away of the walk upon which plaintiff was standing made a case sufficient to require the submission to the jury of the question whether the master was negligent. *Salorz v. Manhattan R. Co.*, Misc. 656; *Thomp. Neg.*, 1106; *Stoher v. St. Louis etc. Co.*, 91 Mo. 509; *Mulcaims v. Janesville*, 67 Wis. 24; 34 Cent. Dig. 1595; *Moynihan v. Hills*, 146 Mass. 586; *McBeath v. Rawle*, 93 Ill. App. 212; *Ry. Co. v. Wood*, 63 S. W. (Tex.) 164; Am. Dig. 1901, B-2730; *Alabaster Co. v. Lonergan*, 90 Ill. App. 353; *Morton v. Zwierzykowski*, 91 Ill. App. 462.

Since the testator ordered plaintiff into a situation of greater danger than the work for which he was employed, namely, that of clerk in a store, plaintiff had a right to assume that the walk was fit and safe to walk upon, and so it was error to direct a verdict for defendant. *Miller v. Union Pac. Ry. Co.*, 17 Fed. 67; *Lalor v. Chicago, etc.*, 52 Ill. 401; *Lehman v. Siggeman*, 35 Ill. App. 161; *Consolidated Coal Co. v. Haenni*, 48 Ill. App. 115; *Coal Co. v. Hoodlet*, 129 Ind. 327; *Chicago, etc. v. Haney*, 28 Ind. 28; *Jones v. Ry. Co.*, 49 Mich. 573; *Nuttal v. Shipbuilding Wks.*, 4 Lanc. Law. Rev. 161; *Norfolk v. Ward*, 9 Va. 687; *Swoboda v. Ward*, 40 Mich. 420; 34 Cent. Dig. 1545.

In an action against a master for personal injuries to his servant, due care on the part of the servant may be inferred from the absence of evidence of negligence, as from the positive acts of diligence. *Caron v. Ry. Co.*, 164 Mass. 523; *Ry. Co. v. Day*, 91 Ga. 676.

There being no affirmative evidence of plaintiff's negligence, it was for the jury to determine why he was upon the walk at the time it fell. *Galvin v. New York*, 112 N. Y. 223; *Con. Ry. Co. v. McMullen*, 117 Ind. 439.

Plaintiff's lack of contributory negligence may be inferred from the circumstances, it need not be directly shown. *Nelson v. Ry. Co.*, 38 Iowa 564; *Mayo v. Ry. Co.*, 104 Mass. 137; *Sickles v. Ice Co.*, 153 N. Y. 83; 99 Am. Dig. 2890; *Corbin v. Electric Co.*, 78 Ill. App. 516; *Stewart v. Ferguson*, 34 N. Y. App. Div.

515; *Dumas v. Stone*, 65 Vt. 442; *Eastman v. Curtis*, 67 Vt. 432.

That a servant knew of the danger incident to the failure of his master to supply proper appliances, and therefore took the risk thereof, will not be ground for non-suit, unless such knowledge clearly appears, or the inference thereof is unavoidable. *Ellengson v. Chicago etc. Co.*, 60 Mo. App. 679; *Appel v. Buffalo etc.*, 2 N. Y. St. Rep. 257; *Hulihan v. Green Bay Co.*, 68 Wis. 520; *Nadan v. Lumber Co.*, 76 Wis. 120; *Davidson v. Cornell*, 132 N. Y. 228; *Ry. Co. v. Currier*, 108 Fed. 19; *Bridge Co. v. Olsen*, 108 Fed. 335.

J. W. Redmond and *R. W. Hulburt* for the defendant.

ROWELL, C. J. Appeal from the decision of commissioners. The plaintiff declares in case for personal injuries alleged to have been received by him because of the testator's negligence in sending him to alter or repair the testator's reservoir, which contained a walk, known to the testator, but unknown to the plaintiff, to be insufficient and unsafe, and which fell with plaintiff upon it, whereby he was precipitated into the reservoir and hurt.

Suppose the risk to have been extraordinary, which is most favorable to the plaintiff, the burden was on him to show that he did not assume it; and to do that, it was necessary for him to show that he did not know and comprehend it, and that it was not so plainly observable that the law will charge him with knowing and comprehending it. *Dunbar v. Central Vt. R. R. Co.*, 79 Vt. 474, 65 Atl. 528. And the declaration recognizes this necessity, for it alleges want of such knowledge. But the testimony does not tend to prove the allegation. All the testimony there is that the plaintiff claims tends to prove it, comes from his wife when she says she did not know of her husband's working on the reservoir before the time of the accident. The plaintiff claims that this testimony tends to show that he never did work on the reservoir before, and therefore that it laid the foundation for an inference that he did not know the condition of the walk because of his want of opportunity to know. But that testimony does not tend to show that the plaintiff never worked on the reservoir before. It amounts to no more than

saying that the witness did not know whether he had or not, as there is no ground to infer that she would have known of it if he had.

The defendant's motion for a verdict was properly sustained because plaintiff's knowledge of the risk was not negatived.

Judgment affirmed, and ordered to be certified down.

W. C. SHELDON v. J. F. WRIGHT.

October Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, HASLTON, and POWERS, JJ.

Opinion filed October 5, 1907.

Physicians and Surgeons—Malpractice—Evidence—Necessity of Expert Testimony—Force and Weight of Expert Testimony—Complaints of Suffering—Experiments—Probative Presumptions—Exception—How Properly Taken—Instructions.

When during a trial counsel want evidence excluded, it must be objected to, and then the party against whom the court rules may take an exception, but counsel's occasional ejaculation of the word "exception," as evidence is being received, raises no question for the decision of the court, and reserves nothing for review.

In an action against a surgeon for malpractice in treating a broken leg, it appearing that plaintiff called defendant to treat the leg because plaintiff's employer, who was obligated to furnish him needed medical and surgical services, designated defendant to perform them, plaintiff was properly allowed to take defendant's testimony to the effect that for such services he received a yearly salary from plaintiff's employer, and that his compensation did

not depend on the number of cases he treated, except that in some cases his salary was increased.

Plaintiff was properly allowed to testify that, some time after his case had been discharged by defendant, another physician put a plaster cast on his leg, that he wore this about two weeks, and that it assisted him in travelling.

Plaintiff was entitled to testify that at the time of the trial he was unable to run and travel on the injured leg as he could formerly.

In the trial of an action for malpractice in treating a broken leg, it was not reversible error for the court to remain in the courtroom at the bench, the end of which was but a few feet from the connecting door of an adjoining room, and allow the jury to retire to that room and there, in the presence of defendant and his counsel, to examine plaintiff's leg, the connecting door being closed for a very short time, and left partly open during the remainder of the examination, but not enough so that any one in the courtroom could see the proceedings in the adjoining room.

In an action for malpractice in treating a broken leg, where plaintiff, in answer to questions in cross-examination, testified that, some time after his case had been discharged by defendant, he went to Boston to see what he could have done for his leg, saw a physician there, but had nothing done, it was not, in the circumstances, harmful to defendant to allow plaintiff to testify, on redirect-examination, that the reason why he had nothing done for his leg in Boston was because the physician there advised against an operation then, that he said, "he would have to cut it open, chisel the bone off and wire it together, advised me not to have it done until cooler weather, blood poisoning was liable to set in, and he wanted \$100 to do the job."

The testimony of plaintiff's brother that, some time after defendant had discharged plaintiff's case, and in consequence of a talk between the witness and a local physician, he furnished plaintiff money wherewith to go to Boston to consult a surgeon about his leg, though wholly immaterial, was harmless to defendant.

In an action for malpractice in treating a broken leg, plaintiff's daughter having testified that every day her father complained of his leg's paining him, she was properly allowed further to testify that when he came home at night he "usually" took the leather and bandages off the leg and said, "it gets tired," as those doings and complaints fairly related to the time they were done and

made, the word "usually" being chosen to denote merely the frequency of the complaints.

In an action for malpractice in treating a broken leg, it was proper to allow one of defendant's medical experts to state, in cross-examination, that the bearing of the two fragments of the broken bone, as shown by an x-ray picture of plaintiff's leg and already in evidence without objection, was not exactly in line.

Although the experiment was not a felicitous one for evidentiary use, it was not error, as against defendant's mere general objection and exception, to allow plaintiff's wife to testify that about two weeks after defendant discharged plaintiff's case, she put her fingers on the floor, that plaintiff then placed the foot of his injured leg upon her fingers and pressed with his foot until he complained that it hurt him, thereby showing her how much weight he could bear on that foot.

A question in cross-examination, so framed as practically to assume what the witness has not testified to, was properly excluded.

In an action for malpractice in setting and treating a broken leg, on which defendant had used a certain large splint, in respect of the fitness of which for that purpose the evidence was conflicting, although defendant testified that he was a regular graduate in medicine and surgery and had been in practice thereof for thirty-three years, that he had large experience in the reduction, setting, and treatment of fractures, including the kind plaintiff had suffered, and for such fractures had made extensive use of the splint in question, the court properly excluded his offer to show by himself that his treatment of fractures, during the thirty-three years prior to his treatment of plaintiff's injury, had been the same as his treatment of that injury, and that the results had always been good.

Since, throughout the taking of the evidence, both parties proceeded on the theory that the test of defendant's liability was whether he had met the requirements of "good surgery," defendant cannot complain for that the court also proceeded on that theory in its rulings as to the admission and exclusion of evidence.

The court properly refused defendant's requested instruction that, in passing on his treatment of plaintiff's leg, the jury should consider only the expert evidence, defendant's own testimony, and whatever declarations and admissions he had made.

Since the evidence of the results of defendant's treatment of plaintiff's leg did not stand alone, but was inextricably interwoven

with a large amount of medical and other testimony, the court properly refused defendant's requested instruction, "that the results of defendant's treatment of plaintiff's leg are in themselves alone not the slightest evidence of defendant's negligence or want of skill."

Defendant's requested instruction that "the negligence or lack of skill of the defendant is not to be tested by the results of the treatment" was sound, and was substantially complied with.

In an action for malpractice in treating a broken leg, there can be no recovery without medical expert testimony tending to show defendant's lack of the requisite care and skill.

In an action for malpractice, where the medical expert testimony was conflicting, the court properly instructed the jury that they should exercise their judgment in considering and weighing such testimony, as they would in considering any other kind of evidence; and the instruction, "but you are not bound to accept the statements or conclusions of expert witnesses," was not, in its connection, objectionable as allowing the jury to disregard such evidence, if they chose.

There are probative presumptions, and there are rules of law, frequently termed "presumptions," which, as such, are merely *locative*, and without probative force,—their office being performed when they have placed upon the respective parties their appropriate duties.

In an action for malpractice, though defendant's negligence is not presumed, but the burden is on plaintiff to show such negligence, there is no presumption that defendant had or exercised the requisite degree of skill and care.

CASE for malpractice in setting and treating a broken leg. Plea, the general issue. Trial by jury at the September Term, 1905, Orleans County, *Munson, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The defendant discharged the case March 30, 1904. The opinion sufficiently states the case.

J. W. Redmond and *B. F. D. Carpenter* for the defendant.

It was error to allow plaintiff's daughter to testify that when defendant came home at night he usually took the band-

ages off the leg "and he says it gets tired." The testimony of such a witness is confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain. *Plummer v. Rice*, 71 Vt. 118; *State v. Fournier*, 68 Vt. 262; *Knox v. Wheelock*, 54 Vt. 150; *Kidder v. Bacon*, 74 Vt. 263.

Defendant's offer to show that he had made successful use of the splint in question in the treatment of such fractures was improperly excluded. *Darling v. Westmoreland*, 52 N. H. 405; *Brown v. R. Co.*, 22 Q. B. D. 391; *Cleveland R. Co. v. Wynant*, 114 Ind. 525; *Topeka Water Co. v. Whiting*, 58 Kan. 639; *Hill v. R. Co.*, 55 Me. 438; *Crocker v. McGregor*, 76 Me. 282; *Bemis v. Temple*, 162 Mass. 324.

It was error to allow plaintiff to testify that he could not "run and travel" on the injured leg as he could formerly, and that he did not have so free use of his ankle as before the injury. This exacts too much of defendant. A physician or surgeon does not insure a cure, but is only required to have and use the requisite degree of care and skill. *Hathorn v. Richmond*, 48 Vt. 557; 22 Am. & Eng. Enc. 800; *Pike v. Hornsinger*, 155 N. Y. 201; *Jewett v. Buck*, 78 Vt. 356, 93 Am. St. Rep. 657; *Ewing et al. v. Goode*, 78 Fed. 442; *Wood v. Baker*, 49 Mich. 295; *Sims v. Parker*, 41 Ill. 284; *Piles v. Hughes*, 10 Iowa 579; *Wurdeman v. Barnes*, 92 Wis. 206; *Pettigrew v. Lewis*, 46 Kan. 78; *Craig v. Chambers*, 17 Ohio St. 253; 3 Wharton & Stiles, Med. Jur. (15th ed.) §466; note in 93 Am. St. Rep. 657-669.

The charge allowed the jury, if they chose, to lay the medical expert testimony out of the case. This was error. Whether defendant exercised the requisite degree of care and skill should have been determined from the expert evidence alone. *Carstens v. Hauselman*, 61 Mich. 426; *Bigney v. Fisher* (R. I.), 59 Atl. 72; *Baker v. Lane* (R. I.), 49 Atl. 963; Wharton & Stiles, Med. Jur. (5th ed.) §514; *City of Kansas v. Hill*, 80 Mo. 523; *Washington v. Railroad*, 59 Wis. 364; *In Re Cowdry*, 77 Vt. 359.

The law presumes that defendant did his duty, and the jury should have been so instructed. *State v. Housekeeper*, 14 Am. St. Rep. 342, 16 Atl. 382; *Stiles v. Tyler* (Conn.), 30 Atl. 165; 2 Best Ev. (Wood's Ed.) §348.

Young & Young for the plaintiff.

Defendant reserved no question by merely ejaculating the word "exception." 1 Wig. Ev., §§18, 20; *Fitnam Trial Proc.*, §649; *Clarkson v. Hodges*, 65 Vt. 273; *Wead v. St. J. etc. R. Co.*, 66 Vt. 420; *Laurent v. Vaughn*, 30 Vt. 90.

It was not error to allow the jury to examine plaintiff's leg in the judge's room. That was but the ordinary case of allowing the jury to view the subject-matter in question. 3 Wig. Ev., §2194.

The court properly allowed plaintiff's daughter to testify that plaintiff complained of the pain in the injured leg, and that at night when he unbandaged it "he says it gets tired." *Mayo v. Wright*, 63 Mich. 32; 3 Wig. Ev., §§2208, 1718; *State v. Davidson*, 30 Vt. 383; *Bagley v. Mason*, 69 Vt. 175; *Hawkes v. Chester*, 70 Vt. 271.

The court properly excluded defendant's offered evidence as to the results of his use of the splint in question in other cases. *Link v. Sheldon*, 136 N. Y. 1, 9; *Leighton v. Sargent*, 31 N. H. 119.

The results of the treatment, in connection with other proved facts, do tend to show malpractice, though the results alone have no such tendency. 3 Wharton & Stiles Med. Jur. 523; *Hickerson v. Neely*, 21 Ky. Law Rep. 1257.

HASELTON, J. This was an action of case for claimed malpractice. In the evening of January 30, 1904, the plaintiff, Mr. Sheldon, at Barton Landing, where he lived and was in the employ of the E. L. Chandler Company, suffered a fracture of the tibia of his right leg. The fracture was oblique as distinguished from transverse. The plaintiff's family physician, Dr. Parlin, was forthwith called and then set the fractured bone. Dr. Parlin attended to the leg until February 2, 1904, when Dr. Wright, the defendant, was called by Mr. Sheldon, and took the case. Dr. Wright was a physician and surgeon in practice at Barton Landing, and was called by Mr. Sheldon because his employer, the Chandler Company, whose contract duty it was to furnish the medical and surgical services required, designated Dr. Wright to perform them.

Subject to objection and exception the plaintiff was allowed to take the testimony of the defendant to the effect that he drew a yearly salary from the company, and that his compensation did not depend upon the number of cases he treated for the company, except that in some cases the company added to his salary. In this there was no error. The plaintiff had the right to call the defendant to the witness stand, and, with the privileges of cross-examination, to inquire into his relations to this case, and, since his relations thereto involved his relations to the Chandler Company, to inquire into those so far as the above recital shows that they were inquired into.

Subject to objection and exception the plaintiff testified that some time after his case had been discharged by the defendant, Dr. Longe of Newport put a plaster cast upon the leg, that this was worn about two weeks, and that it assisted the plaintiff in getting about. This testimony was properly heard. The history of the leg from the time of the fracture to the trial, the treatment it had received and the results thereof, whether beneficial or injurious, were calculated to throw light both upon the question of liability and upon the question of damages. After giving his testimony as to the Longe cast, the plaintiff gave similar testimony as to a cast put on by Dr. Hardwick, and as to one put on by Dr. Parlin. While the testimony as to the Hardwick and Parlin casts was being taken, the defendant's counsel at three different times uttered the word "exception." The course taken by counsel called for no ruling by the court, the court made none and the defendant has nothing to complain of. If counsel really want evidence excluded it must be objected to. Then, if the objection made is overruled, the objecting party may take an exception, and if the objection is sustained, the other party may take an exception. In the taking of testimony the occasional ejaculation of the word "exception" is in the nature of a running and unfavorable comment on the proceedings, and nothing more. It raises no question for the decision of the court and reserves nothing.

Other claimed exceptions to the admission of evidence stand as do those last considered. It may be said here, once for all, that those are not further noticed. However, all the substantial questions sought to be raised by the defendant were at

some stage of the trial properly raised and so have been considered.

Subject to objection and exception the plaintiff testified that he was not able to run and travel on the leg as formerly. The objection was that the condition of the leg at the time of the trial, its condition as to strength and how it compared with what it was before it was broken had no tendency to show any negligence on the part of the defendant. But upon any theory as to what would and what would not tend to show negligence, it would have been impracticable, undesirable and improper to keep from the jury the condition of the leg at the time of the trial, its condition before the fracture, and the nature of the fracture, to say no more. These things were essential to make intelligible the expert evidence on both sides.

At a point in the examination of the plaintiff, his counsel expressed a wish to then show the leg to the jury. Thereupon the court suggested that the exhibition be made in the judges' room, and said that for that purpose the judges' room would be treated as a part of the court room. Arrangements as to the presence of counsel and medical men were made at the bench, and the jury were sent into the judges' room, whither they were accompanied by two of the defendant's counsel, who remained there until the jury returned. After a little, the defendant went in. Soon after that the attention of the court was called to the fact that the door into the judges' room was closed, whereupon the court had it partly opened, but not enough so that any one in the court room could see the proceedings in the judges' room. The presiding judge remained at the bench, the end of which was but a few feet from the connecting door, until the jury returned. No objection was made to the examination of the leg by the jury, but we think that a fair construction of the recital in the bill of exceptions is that it was under the defendant's objection and exception that the examination was had in the judges' room.

It does not clearly appear what motive influenced the court in directing the observation of the leg to be had in the judges' room, although there may have been some reason not made apparent. In any event it would have been well for the court to have been in the judges' room with the jury. However, it is

clear that the defendant's cause was not harmed in consequence of the place of the examination. Had anything improper taken place or been attempted the defendant's counsel in the jury room could have made an objection to the court as readily as though the proceedings had taken place with the jurymen in their seats. Indeed, it often happens that a large map or plan is displayed and explained to the jury in such a manner that the jurymen, or a part of them, are screened from the view of the court, which then has little if any more opportunity of knowing what is going on than the court had during the episode in question. It is not infrequent that things are done in the presence of the jury which the court does not see, and still oftener, perhaps, that things are said which the court does not hear. Desirable as it is that an incident like that under consideration should be avoided, error cannot be predicated upon anything that appears in reference thereto. The manner in which a trial court meets the various emergencies that it has to encounter is not to be judged by any utopian standard. Here, the attitude, position and supervision of the court were such that in a practical sense the proceedings were all before the court. The circumstance of the shutting of the door has no substantial weight, since it fairly appears that it was no sooner shut than it was opened.

In response to questions put to him on cross-examination the plaintiff testified that he went to Boston in May, 1904, that he went there to see what he could have done for his leg, that he saw a physician there, but that he had nothing done for his leg. The fact that in May, 1904, the plaintiff's leg was in such a condition that he was able to go to Boston was probably material, but it is difficult to understand why testimony was elicited to the effect that he went there to see what he could have done for his leg, that he saw a physician, and had nothing done, unless it was that the jury might infer that the physician thought the leg well enough as it was. However this may be, the plaintiff's counsel could not be expected to leave the matter as defendant's counsel had left it, and in fact they were not content so to leave it. To show what ensued we quote from the exceptions as follows:

"On re-direct examination the plaintiff was allowed to testify and did testify as follows, subject to the objection and exception of the defendant:

Q. Why didn't you have anything done in Boston?

Redmond:—We asked him if he went to Boston and he answered it. We except if the answer relates to any conversation.

A. The doctor advised me not to have anything done at the present time, said he had got to cut that open——

The Court:—This comes in subject to exception.

A. (con.) He said he would have to cut it open, chisel the bone off and wire it together, advised me not to have it done until cooler weather, blood poisoning was liable to set in and he wanted \$100 to do the job.

Q. It was because of the advice he gave you, you did not then attempt to have it done?

A. Yes, sir."

The question, "why didn't you have anything done in Boston?" was a proper one. The answer went beyond what was proper, and was objectionable because of its hearsay character. It is argued by the plaintiff that the well established rule that an exception does not lie to an improper answer to a proper question applies here. The rule invoked is certainly well established. *Lynds v. Plymouth*, 73 Vt. 216, 50 Atl. 1083; *Plumer v. Ricker*, 71 Vt. 114, 41 Atl. 1045; *Hanks v. Chester*, 70 Vt. 273, 40 Atl. 727; *State v. Marsh*, 70 Vt. 288, 40 Atl. 836; *Cutler v. Skeels*, 69 Vt. 154, 37 Atl. 228; *Foster's Exr. v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Lawrence v. Graves' Est.*, 60 Vt. 657, 15 Atl. 342; *Frary v. Gusha*, 59 Vt. 257, 9 Atl. 549; *Houston v. Russell*, 52 Vt. 110; *Morse v. Richmond*, 42 Vt. 539; *Randolph v. Woodstock*, 35 Vt. 291. This rule, while well established, is not strictly applicable here since the exceptions recite that the testimony above quoted came in subject to objection and exception. Yet the above cases have been collected and referred to as they have a strong bearing upon the question under consideration. The interrogatory which brought out the objectionable answer was a proper one, and the plaintiff went on to tell why he didn't have anything done to his leg, in the way most natural for an unprofessional witness and nobody tried to stop him or to have him stopped. It would have been better if the

court had stopped him instead of saying "this comes in under exception." It would have been better if his counsel had stopped him, but it is to be noted that his counsel were inquiring about a matter opened up by the defendant and so cannot be assumed to have known any better than the defendant's counsel or the court but that each clause of the answer would be the last. It would have been better if defendant's counsel had not remained quiescent instead of relying upon the qualified objection made before the answer was begun. When the answer was finished neither side moved to have it disregarded by the jury, and the court said nothing to the jury about it, though on request the court undoubtedly would have dealt with the matter promptly and satisfactorily. The matter having been left as it was, the real question for this Court is, was the answer harmless? Upon an examination of the answer it is seen that it related to the doctor's explanation of the nature of the operation of resetting, the reason for not doing such an operation in warm weather and a suggestion of what the doctor would charge in case of an operation. Not a word of the doctor's was recited in condemnation of the original operation; the suggestion of the possibility of blood poisoning in case he operated in May, did not indicate any danger of it without an operation, and if it reflected on anybody's surgical skill, it reflected on that of the Boston doctor himself. In view of the inquiries put in behalf of the defendant, the plaintiff had a right to say that he had nothing done to his leg then because the doctor advised delay, if that was his reason; or, if it was true, to say that he had nothing done in consequence of what the doctor told him his charges would be if he operated then; or if both reasons influenced his mind he had a right to assign both. He gave his reasons in an improper way, but this Court cannot conceive that the form in which they were given was a factor in the defeat of the defendant, or that any part of his answer which did not relate to such reasons was in any way harmful to the defendant. As is apparent, the disposition here made of this matter renders it unnecessary to consider whether or not the answers and interpolations of a testifying party should be treated otherwise than those of a mere witness.

Frank Sheldon, a brother of the plaintiff, testified, under objection and exception by the defendant, that in consequence

of a talk that he had with Dr. Longe he furnished the plaintiff some money with which to make the trip to Boston above referred to. The plaintiff's claim is that this evidence was admissible as bearing upon the reason why he did not have an operation performed in Boston, and as corroborating his testimony as to why he went to Boston. The defendant's claim is that it was immaterial to any issue, and that it was prejudicial in that it was an appeal to the sympathy of the jury for a man in financial distress. To this Court it seems entirely clear that it was too remotely related to any issue in the case to be material, and altogether too colorless to be harmful.

The plaintiff's daughter testified that every day her father complained of his leg paining him. Then under objection and exception she testified that when he came home at night he usually took the leather and bandages off it and said, "it gets tired." These doings and complaints, as testified to, fairly related to the condition of the leg at the times they were done and made. The evidence tended to show that at the times referred to he was taking off the leather and bandages because the leg was then tired. The use of the word "usually" is criticised, but the word was used merely to denote the frequency with which the complaints testified to were made. In receiving the testimony of the daughter there was no error.

An X-ray picture of the plaintiff's leg was in evidence without objection. This was shown to one of the defendant's medical experts, and, under objection and exception, he was allowed, in substance, to state that the bearing of the two fragments of the broken bone as shown by the picture was not exactly in line. The defendant's counsel claim that this testimony was erroneously received because the jury could tell about that matter as well as any expert. But the doctor was using the picture for the purpose of demonstration and could rightly point out the things which his practiced eye discovered so far as they were of significance. It was as though the expert had used the leg itself for the purpose of explaining its condition to the jury. The picture is referred to, and an examination of it is quite convincing of the propriety of medical testimony as to what it really shows. *State v. Wetherell*, 70 Vt. 274, 40 Atl. 728, in which a difficult communication was properly deciphered by a witness, is in point.

The plaintiff's wife testified that one day between March 30 and April 18, 1904, she put her fingers on the floor, and her husband put his foot on her fingers and showed her how much weight he could bear, that he pressed on the foot until he complained that it hurt him to do so. The above testimony of the wife was taken under a general objection and exception. The objections presented on the defendant's brief are that this experiment in the presence of his wife was a self-serving declaration, and that his complaint then made bore upon no issue in the case. The testimony tended to show that at the time referred to the plaintiff made expressions indicative of the then present condition of his leg. The testimony was not made inadmissible by the fact that the expressions were made in the course of an experiment, nor by the fact that the experiment was made in the presence of his wife. So far as concerns any objection made in argument, the matter stands much the same as would testimony by his wife that he walked across the floor in her presence and while so doing complained of present suffering. Expressions of present pain and suffering are not in the class of self-serving declarations. Had the witness undertaken to gauge the amount of weight he showed her he could bear, there would have been something to think of which has not engaged our attention. The experiment was not a felicitous one for evidentiary use, but the objection was general and points out no error in the testimony with reference thereto. -

On the cross-examination of one Dr. Goddard a question was excluded in view of the way in which the question was framed. Counsel did not act upon a suggestion made by the court in its ruling and obviate the objection which lay in the mind of the court by modifying the question, but took an exception which is relied on. The question was hardly fair to the witness in that it practically, though not distinctly, assumed what he had not testified to; and counsel should have embraced the opportunity given to frame an entirely unobjectionable question. The aim of the court was well directed towards a just treatment of the witness, and counsel should have seconded the efforts of the court. This exception is without merit.

It appeared that the defendant had used a certain large splint on the plaintiff's broken leg, and the evidence in behalf of the respective parties differed as to the propriety and fitness

of its use. After there had been evidence both ways the defendant gave the testimony, and made the offer shown by the following recital in the exceptions: "The defendant testified that he was a physician and surgeon regularly graduated in medicine and surgery; that he had been in the practice of medicine and surgery for thirty-three years; that he had had large experience in the reduction, setting and treatment of fractures, including fractures of the tibia at the junction of the middle and lower third; that for such fractures of the tibia he had made extensive use of defendant's 'Exhibit C'; thereupon the defendant offered to show by himself that his treatment of fractures during his said thirty-three years of experience prior to the accident in question, had been the same as his treatment of the plaintiff's said injury; and that the results of said treatment had always been good results."

The character of the offer, following the testimony, was extraordinary. It was an offer to show, without any restriction as to their character or location, without excluding even fractures of the ribs or skull, that his treatment of fractures generally had been the same as his treatment of the fracture of the tibia in the plaintiff's leg, which treatment included the use of the splint in question. The offer was excluded, and it is safe to say that the defendant was not harmed thereby. Whether under any offer the defendant was entitled to give evidence of his treatment of any other fractures, and of the good results of his treatment thereof is a question not raised.

By several requests the defendant asked the court to charge, in substance, that in passing on the treatment he had given the plaintiff's leg the jury must consider only the expert evidence, the defendant's own testimony and whatever admissions or declarations he had made. These requests were refused and rightly.

In determining the facts about the previous condition of the leg, about the injury, and about the operation and the subsequent treatment, the testimony of various non-expert witnesses was for consideration as well as the testimony and admissions of the defendant. The plaintiff himself appears to have testified to a great variety of facts relevant to the treatment. The form of these requests was varied but all were fallacious. The expert testimony would have been of no concrete value without a deter-

mination of facts, which were to be determined by a consideration of every piece of relevant evidence whatever its source.

The plaintiff introduced a lengthy deposition given by Dr. Smith of West Newton, Massachusetts, a physician and surgeon of large experience and wide observation. Many of the questions and answers in his deposition related to the proper treatment of such a fracture as that in question, to the practice in such cases of surgeons in good standing, in short, to the requirements of "good surgery," without reference to the surgical skill ordinarily possessed and exercised by physicians and surgeons practicing in the same general neighborhood as that in which the defendant practiced. Some of the questions and answers referred to were read under objection and exception on the grounds of incompetency and immateriality, some of the same class were read under objection and exception for improper assumption, and still others of like character in the respect noted were read without objection. Some testimony of the same character was elicited from the defendant's experts on cross-examination, and a part of this was under objection and exception. In argument it is urged that there should be a reversal because of this testimony with regard to the requirements of good surgery in general. This claim makes it necessary to consider how the case was tried. The bill of exceptions shows that the evidence of the defendant was directed to the claim "that the plaintiff had as good a right leg in every particular as could be expected from the best surgery." In the charge the court stated the issue between the parties as follows: "The plaintiff claims that the defendant was negligent in the setting of his leg, and in the use of proper appliances to fasten and keep it in position, and in the subsequent care of it, and that this negligence has resulted in an undue shortening of his leg, in an abnormal turning out of his toes, and in a deformity of the foot which prevents his treading evenly upon it. The defendant claims that the leg was properly set, secured and cared for, and that the results obtained are entirely consistent with good surgery, and that if they are not, the defects are due to the failure of the plaintiff to follow the instructions given him. This states in a few words what I understand to be the exact issue between the parties."

No exception was taken to this statement by the court, and no request was made for its modification. Moreover, an examination of the case satisfies us fully that the court stated the issue between the parties exactly as they had made it. None of the objections to evidence called attention to the point now made. In the deposition of Dr. Smith questions and answers which suggested this ground of objection and no other were read without objection. Questions and answers which suggested this ground of objection, were read without other objection than that there was improper assumption in the question. The questions which were objected to for incompetency and immateriality had in them some element or elements not in the questions which passed without objection, or without objection other than for improper assumption, and the discrimination can be accounted for only on the theory that the objections were aimed at such other element or elements.

One of the questions which the defendant in argument claims was improperly allowed on account of its reference to good surgery without qualification, was a question put in cross-examination to one of the defendant's experts, a surgeon of large hospital practice and experience in this country and in Europe. It related to the use of the splint which has been referred to, and which was defendant's Exhibit C. We quote the question and the grounds of objection, since in this instance they were specific, and had no reference to the question made in argument. The question was as follows:

"I call your attention to this defendant's Exhibit C. Assuming that that was put on a leg which was fractured as Mr. Sheldon's leg was, a simple oblique fracture of the tibia at the junction of the middle and lower third; that it was fastened to the leg by a strap around the splint above the knee, another strap around the splint above the ankle, and was kept there for four or five weeks without any fastening to the foot to hold it in any particular position or angle; a tendency to rotate was discovered shortly after the foot was put onto that splint; no change of treatment was made from the time the tendency to rotate was discovered until the splint was removed some four or five weeks after. In the meantime the whole foot had rolled up so the heel had raised from the splint, the side of the foot moved down so the toes began to turn over until they came to

a point where all the toes except the big toe touched the splint and the sole of the foot was rolled up as it would be in that way and nothing was done to overcome that, would you call that good surgery?"

The objection by the defendant's counsel and the grounds therefor were stated thus: "I object. He has got the heel off the board where he would not allow me to get it. In the second place he says there was a tendency of the foot to rotate. What that means I don't know, there is no evidence of a tendency of the foot to rotate while that was on the board, as we recollect."

Further indications that the court correctly understood and stated the issue made by the parties are found in the requests of the defendant for instructions upon the subject of "good surgery" in general. Throughout the taking of evidence the question of "good surgery" was treated as the defendant was content to have it treated, and so in that matter he has nothing to complain of.

Notwithstanding the issue the parties had made, the court very properly saw fit to make the following statement to the jury: "A person who holds himself out to the public as a physician and surgeon is held responsible for the possession of the ordinary skill and knowledge which pertain to his profession, and to ordinary care in the exercise of that skill and knowledge. He is not required to have the highest degree of skill obtainable in the profession; nor even the skill generally shown by those whose location gives them unusual opportunities for such a practice. But he is bound to have and exercise ordinary skill, such skill as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily have and exercise in like cases." No exception was taken to the above statement, but the passage is quoted for the purpose of making it clear that this case is not a departure from the law as it has been understood and applied in this State. *Hathorn v. Richmond*, 48 Vt. 557; *Mullen v. Flanders*, 73 Vt. 97, 50 Atl. 813. In view of some expressions in argument by counsel, it may not be amiss to say that the phrase "the same general neighborhood" is of much broader application than would be the phrase "the same neighborhood."

The defendant requested the court to instruct the jury "that the results of defendant's treatment of plaintiff's leg are in themselves alone not the slightest evidence of defendant's negligence or want of skill." Another request to the same effect was made. But here the evidence as to the results of the treatment did not stand alone, but was inextricably woven in with a large amount of medical and other testimony, and was so connected with the rest of the testimony that it had to be weighed therewith. There was no occasion for charging as to evidence of results standing alone. In most cases there are many things in evidence which standing alone have no probative force but which, in connection with other things which the evidence tends to prove, are significant. In such cases it is not the duty of the court to take up each piece of evidence by itself and say to the jury that standing alone it goes for nothing.

Here, as the exceptions recite, "the evidence of the defendant tended to show that the plaintiff had as good a right leg as could be expected from the best surgery after such a fracture of the tibia as he sustained," and, as the exceptions further recite, evidence on the part of the plaintiff tended to show that the result was such as could only come "from poor and unskillful surgery and treatment in the case of such an injury as plaintiff received." With evidence from both sides as to results as tending to indicate the character of the surgical treatment of the leg, the court could not seriously consider the requests just mentioned. The court rightly refused to comply with them.

The defendant requested the court to charge that "the negligence or lack of skill of the defendant is not to be tested by the results of the treatment." The proposition contained in this request is a sound one, was applicable here, as, in general, it is in malpractice cases. It was not in terms complied with, and the question remains was it substantially complied with? The charge clearly enough was to the effect that there was no liability on the part of the defendant unless there was a failure on his part to have and exercise the requisite degree of skill, and unless damage to the plaintiff resulted from such failure; and the statement of the case and of the issues, what was said upon the question of liability and non-liability, and the tenor of the entire charge were such that the jury must have understood that the results did not test or determine the question of negli-

gence or want of skill on the part of the defendant. Since apparently malpractice cases are sometimes brought simply because of dissatisfaction with the results of a surgical operation, and since evidence of the results is usually connected with other evidence in such a way that the results can be held up before the jury in both the opening and closing argument for the plaintiff, and since the members of the medical profession are often called upon to act when disease or accident makes heavy the odds against the accomplishment of the desired result, the jury should always be made to understand in malpractice cases that results do not determine whether or not a physician or surgeon has performed his duty; and it is because the charge unmistakably conveyed the right understanding in this regard that we find no error in the failure of the court to use the exact language of the request under consideration.

The defendant excepted to the charge of the court in respect to the medical expert evidence, claiming that the jury were left to determine the matter in controversy on their own good judgment in disregard of such evidence if they saw fit. This was a case in which the testimony of the experts was conflicting, and, as applied to the case, the actual charge as to such testimony, taken as a whole, was sound in law and was a practical guide to the jury. The court said: "The testimony of professional or scientific witnesses upon the subject of their special knowledge forms a class by itself; but it is governed by the ordinary rules. It is true that the opinion of one who has given special study to a particular subject and had large experience in connection with it, in whom you feel that you have confidence, is entitled to very careful consideration, and may be of controlling weight. But you are not bound to accept the statements or conclusions of expert witnesses. Their testimony is simply one kind of evidence, to be considered in connection with all the other evidence bearing upon the same point. In considering the testimony of an expert witness you take all his testimony together and see what the fair result of it is. You exercise your judgment in considering and weighing the testimony of an expert the same as you would in considering any other kind of evidence." The sentence particularly complained of in the above quotation is: "But you are not bound to accept the statements or conclusions of expert witnesses." But this sentence in its con-

nection was in no way misleading. The conclusions of the experts were conflicting. If some were right others were necessarily wrong. The jury were left to determine the matter upon the whole evidence and this course was entirely right, as, in any view, the strictly expert evidence was without value, except as it was based upon facts which the jury might find from other evidence. The ordinary witness testifies as to facts about which the jurymen have or should have no knowledge of their own; but nevertheless they must apply their own good judgment to the testimony of such witnesses in determining what facts are proved. The expert in a case like this testifies to facts of a different class, or to the interpretation of facts, matters, for the most part, about which the jury are not expected to have knowledge of their own, but nevertheless they must apply their sound judgment to the comparison, sifting and weighing of such testimony and to a consideration of the sources from which it comes. In the charge here there was no encouragement of the idea, somewhere suggested, that the introduction of expert testimony constitutes chiefly an agreeable diversion, or a restful surcease of practical combat, during which all concerned in the case may be refreshed and entertained with the niceties of abstract theories and distinctions. The charge presents the sound and sober view that the jury are to hear and weigh the expert testimony, however conflicting it may be, with the same feeling of duty and responsibility as rests upon them in hearing and considering the other testimony, to the end that they may get from it all the aid it can give them in coming to a right decision of the very case in hand.

It is believed to be the law that there cannot be a recovery for malpractice in the case of an operation like this under consideration without medical expert testimony tending to show lack of the requisite skill and care on the part of the defendant. But there may be such testimony, and yet the witness giving it may display such a lack of candor, such feeling, such advocacy, he may testify in such a way as to facts which are matters of common knowledge, or which are established by the testimony of non-expert witnesses, that the jury feel that they cannot in good conscience accept his strictly expert testimony. Where in a case like this there is no expert evidence, which the jury can accept, tending to show malpractice, the jury must give a

verdict for the defendant. But there was no request on the point last suggested, and no exception to the failure of the court to charge in that regard, and apparently the medical expert testimony was of such a character that the propriety of such a charge was not suggested to the mind of any one.

We refrain from discussing the consideration to be given to expert evidence which relates to matters about which there is a considerable stock of common knowledge, yet not such full and accurate common knowledge as to render expert testimony inadmissible. So, too, we say nothing of the consideration to be accorded to undisputed and undiscredited expert testimony upon highly recondite subjects about which men in general can have no knowledge whatever.

The defendant requested the court to charge as follows: "The law presumes that the defendant had and exercised the requisite degree of care and skill; and this presumption is in the nature of evidence in behalf of the defendant, and should be thrown into the scales and weighed with the other evidence in the case making in favor of the defendant." The court did not comply with this request and the defendant excepted. The defendant further excepted, in substance, to the failure of the court to instruct the jury that the law presumes that the defendant did his duty in the premises, and to the failure of the court to charge that there was a legal presumption to that effect which was in the nature of evidence and which was to be weighed by the jury in connection with the other evidence in the case.

This Court does not, however, think that there was any legal presumption here. There was rather an absence of such presumption. Negligence was not to be presumed and the burden of showing negligence was on the plaintiff. With regard to this burden, the court charged fully and correctly. The defendant was not entitled to have the request last mentioned complied with, and the failure of the court to charge in the respects pointed out was simply a failure to wander into error. It is true that the decisions of some courts have, more or less clearly, indicated a legal presumption against negligence in malpractice cases. Such a case is *State to use of Janny v. Housekeeper*, 70 Md. 162, 14 Am. St. Rep. 340, 16 Atl. 382, quoted from by the defendant. But the outcome of what is said in the opinion in that case is that negligence cannot be pre-

sumed but must be affirmatively proved. In a recent malpractice case determined in Minnesota and not cited by the defendant, the court of that State say: "The ubiquitous protectorate which jurisprudence extends to all material interests and to every science and to every art takes note of our common fate, with the possibilities of failure in the professional treatment of disease, and accords the medical practitioner in every case the presumption that he has done his whole duty." *Martin v. Courtney*, 87 Minn. 197, 91 N. W. 487. But this somewhat vague declaration with regard to presumptions simply leads up to the conclusion that a plaintiff who alleges negligence must prove it if he would win his case.

In view of the doctrine in this State that a true legal presumption is in the nature of evidence and is to be weighed as such, *Cowdry's Will*, 77 Vt. 359, 60 Atl. 141, unguarded and inexact expressions about presumptions should here be scrupulously avoided. The defendant argues that there must be in this State the legal presumption which he asserts in favor of physicians and surgeons, since if a physician brings assumpsit to recover for professional services he is not called upon in his opening to negative lack of skill and care in his treatment. But he is not so called upon because of the application of a rule of pleading and practice which makes lack of skill and care a matter of defence. Payment is a defence with respect to which the burden is on the defendant and which need not be anticipated, but this is not because there is a presumption, in the nature of evidence, and to be weighed as such with the other evidence in the case, that no one pays what he owes, at least for twenty years, but because of rules of pleading and practice established with a view to the convenient and expeditious trial of cases.

In a civil case for assault and battery, justification in defence of person or possession need not be negatived by the plaintiff in his declaration or opening case, although an unjustifiable assault is a crime and there is a presumption against the commission of crime. The rule governing the order of proof under a plea of confession and avoidance does not rest upon the ground that there is in any proper sense a legal presumption against the facts relied on in avoidance, but the doctrine or rule that applies is drawn from considerations of convenience and dispatch. If one sues to recover the price of a horse sold

through a verbal contract which included a warranty of soundness he need not, as a part of his case, prove the warranty and the soundness. If the defendant would rely upon the warranty and its breach in defence he must take the burden of proving them. In actions upon a statute there are often provisos and exceptions which it is no part of the plaintiff's case to negative. In actions upon an insurance policy there are in general a long list of representations in the application which are in the nature of warranties, but the plaintiff need not prove the truth of them before he can safely rest. Convenience and fairness govern in these matters. It may be well enough to designate as presumptions the rules which impose the burden of proof upon the defendant with respect to such matters as have been referred to in the foregoing illustrations, but it is considered that as presumptions they are dry ones having only a technical existence, created for the purpose of temporary convenience only, and barren of all probative character when the case goes to the jury on conflicting evidence.

Such so-called presumptions merely perform automatically a part of the office of the ancient "medial judgment," in that they determine what each party must do with reference to the issues joined. See Bigelow's History of Procedure in England, page 288. They are not legal presumptions within the purview of the *Cowdry Will* case, 77 Vt. 359. That case treats of presumptions which everywhere and always arise from certain facts assumed or proved, and not of such as are merely called into a transient and, indeed, fictitious existence, in order that the evidence may be confined to the real issue or issues to be tried. There are probative presumptions; and there are rules, termed presumptions, which, as such, are merely locative, their office being performed when they have placed upon the respective parties their appropriate duties.

In recent years presumptions and their functions have been the subject of much able and discriminating discussion. The doctrine of this Court is sustained by the authority of Lord Coke, who recognizes the fact that there are presumptions which the jury are to weigh "together with other matters," but who classifies presumptions and says of a presumption of one class that "it moveth not at all." 3 Thomas' Coke, 390, 492.

All questions fairly raised by the exceptions taken and relied on have been considered, either singly or in groups.

Judgment affirmed.

JOSEPH WARD'S ADMR. v. PREFERRED ACCIDENT INSURANCE
COMPANY.

October Term, 1904.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
POWERS, JJ.

Opinion filed October 5, 1907.

*Accident Insurance—Construction of Policy—Conflict Between
Written and Printed Provisions—Effect—Oral Evidence—
Knowledge of General Agent Imputed to Company—Evi-
dence—Instructions—Motion for Verdict as Against Weight
of Evidence—Discretion of Court.*

In construing written contracts, the circumstances in which the parties contracted may be considered; and their common knowledge and understanding is sometimes such a circumstance.

Where an insurance company's general agent for a certain district effects insurance therein, his knowledge in respect of the insurance transaction will be imputed to the company.

In an action by an administrator on an accident insurance policy, which by its terms did not cover injury or death "while or in consequence of riding in or on any locomotive, or while walking or being on the roadbed of any steam railway," but the written portion whereof insured the intestate as "contractor, office and travelling," where the evidence tended to show that the intestate was killed by falling from an observation locomotive, while

inspecting railroad bridges in his occupation as railroad-bridge contractor, plaintiff was entitled to show by defendant's general agent who effected the insurance that, in taking the application and effecting the insurance, the witness knew the intestate to be, and for a long time to have been, a railroad contractor, engaged in building railroads and railroad bridges and abutments, as that knowledge on the part of its general agent is imputed to the company, and so tended to show the sense in which the elliptical phrase, "contractor, office and travelling," was used in the policy.

The "travelling" referred to by the phrase of the policy insuring plaintiff's intestate as "contractor, office and travelling," is travel by the methods and conveyances usually incident to the occupation of a contractor who does not himself participate in the actual work of construction.

The court properly excluded a burnt fragment of the application for the insurance in question, both the written and printed parts whereof were incomplete, and which was produced and offered in evidence by defendant without any explanation of its condition.

Evidence examined and held, that it tended to show that plaintiff's intestate was killed by accidentally falling from an inspection car, as the declaration alleged, while he was travelling in that conveyance in pursuance of his occupation of contractor, in which he was insured by the terms of the policy, which method of travel was usual in that occupation and incident thereto; and that, therefore, the court properly denied defendant's motion to have a verdict directed in its favor, on the grounds that the intestate was killed while walking on the railway roadbed or bridge, and in an occupation or exposure more hazardous than that in which he was insured.

An "observation car," designed for inspecting a railroad, and consisting of a locomotive having an observation room built over the boiler in front of the engineer's cab, is a "locomotive," within the meaning of a clause in an accident insurance policy, providing that the insurance did not cover injury or death "while or in consequence of riding in or on any locomotive."

The written portions of an insurance policy will prevail over conflicting printed provisions.

In an action on an accident insurance policy, the written portion whereof insured plaintiff's intestate while travelling in his occupation of a railroad-bridge contractor and builder, by the

methods and conveyances usual in that occupation and incident thereto, where the evidence tended to show that he was killed by accidentally falling from a locomotive while travelling thereon in his said occupation, and that this was a method of conveyance usual in that occupation and incident thereto, plaintiff could recover, notwithstanding the printed portion of the policy provided that it did not cover injury or death "while or in consequence of riding in or on any locomotive."

In order to recover in an action on an accident insurance policy, plaintiff must show that the cause of the accident was the cause alleged in the declaration.

A motion to set aside a verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and its action thereon is not revisable where there is nothing to show that its discretion was not properly exercised.

SPECIAL ASSUMPSIT on an accident insurance policy. Trial by jury at the March Term, 1904, Washington County, *Stafford, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

At the close of all the evidence, defendant moved the court to direct a verdict in its favor for that the evidence did not tend to show that the insured's death was accidental; because the policy provided that it did not cover injury or death "while or in consequence of riding in or upon any locomotive"; because the policy did not cover accident or death occasioned by "walking or being on the roadbed or bridge of any steam railway"; because while the insured was permitted to travel by regular lines of passenger conveyance anywhere throughout the civilized world, it was one of the conditions of the policy that if he should be fatally or otherwise injured in any occupation or exposure more hazardous than that stated in his policy, he or his beneficiary, as the case may be, shall be paid only the amount fixed for such increased hazard in accordance with the classification of risks by the company and as per the table printed thereon. This motion was overruled, to which defendant excepted.

Zed S. Stanton and George W. Wing for the defendant.

Defendant's motion for a verdict should have been granted, for the reasons therein stated. *Laessig v. Travelers Protective Ass'n.*, 69 S. W. Rep. 470; *Aldrich v. Mercantile etc.*, 149 Mass. 457; *Carnes v. Traveling etc.*, 106 Iowa 281; *Employers' Liability Assur. Corp. v. Back*, 102 Fed. 229; *Standard etc. Co. v. Ward*, 65 Ark. 296; *Cram v. Equitable etc.*, 58 Hun. 13; *Murphy v. Am. Mut. etc.*, 90 Wis. 206.

John W. Gordon and S. Hollister Jackson for the plaintiff.

The burnt fragment of the application for the insurance in question was properly excluded, since it was produced by defendant and offered without explanation of its condition. 1 Greenl. Ev., §§605-6; Underhill Ev., §129; 2 Am. Ed. Stephens' Digest Ev. 188, n. 1. "The object of the rule of law, which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; and if a party is in possession of this evidence, and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes, which its production would expose and defeat." * * * "The cause or motive of the destruction is, then, the controlling fact which must determine the admissibility of this evidence in such cases." *Bagley v. McMickle*, 9 Cal. 430; *Edwards v. McKee*, 1 Miss. 123; *Riggs v. Tayloe*, 9 Wheat. 483; *Blade v. Noland*, 12 Wend. 173.

The defendant company, through its general agent, Ballard, knew that Ward was a contractor and builder of railroad work, as well as other work, at the time Ward was insured, and long before that, and subsequently, to the time of his death. They, therefore, insured him while travelling in the usual and ordinary way of a contractor and builder engaged in railroad work. While so employed and while travelling in a usual and ordinary means of conveying such a contractor, Ward met an accidental death. The defendant company insured him against just such an accident as occurred. *Elliott on Insurance*, §393; *Pac. Mut. etc. Co. v. Snowden*, 58 Fed. 342; 1 May on Insurance, §132; *Elliott on Insurance*, p. 137, §158; *Kerr on Insurance*, p. 181, §86.

HASELTON, J. This was an action of assumpsit on an accident insurance policy. The declaration set out the policy with the conditions on the back thereof. The defendant pleaded the general issue and four special pleas to which the plaintiff replied. Trial by jury was had. A verdict for the plaintiff was returned and judgment was rendered thereon.

The insurance company by a policy, which the plaintiff made an exhibit, insured the plaintiff's intestate as "contractor, office and travelling," according to the written words of the policy. One S. S. Ballard, the general agent of the company for the county of Washington, took the application of Ward and forwarded it to the company, and the insurance was effected through said Ballard. Mr. Ballard was called as a witness by the plaintiff, and after he had testified as to the character and extent of his agency, he was permitted to testify, in substance, that in taking the application and effecting the insurance he knew Ward to be, and for a long time to have been, a railroad contractor engaged in building railroads and railroad bridges and abutments as well as a contractor in respect to other matters. This evidence as to the knowledge of the agent was, under the final ruling of the court in reference thereto, used, under objection and exception by the company, as tending to show the application of the words of the policy designating Ward's occupation. The evidence of the agent's knowledge of Ward's previous occupation bore of course only upon his knowledge of Ward's occupation at the time. The final ruling of the court was correct. Ballard's knowledge in the insurance transaction is taken to have been the knowledge of the company, he being its general agent throughout the district within which the insurance was effected, *Carrigan v. Ins. Co.*, 53 Vt. 418; *Fraser v. Ins. Co.*, 71 Vt. 482; and the company's knowledge that Ward was a railroad contractor acting in that occupation tended to show the sense in which the brief and elliptical phrase "contractor, office and travelling" was used in the policy issued by the company. The company's knowledge was one of the circumstances material to an interpretation and construction of the words that it used. Oral evidence with reference thereto did not vary the terms of the written contract and violated no rules of evidence. In the construction of contracts, the circumstances in which the parties contract may be looked at, and their common knowledge

and understanding is sometimes, and is here, such a circumstance. *Rioux v. Ryegate Brick Co.*, 72 Vt. 148; *Granite Works v. Bailey*, 69 Vt. 257; *McGowan v. Griffin*, 69 Vt. 168; *Hart v. Hammond*, 18 Vt. 127.

The agent Ballard was called as a witness by the plaintiff. On his cross-examination he was shown what the examining counsel denominated and what in fact was "a remnant of a paper," and the evidence of the witness tended to show that it was a part of the application for the insurance in question. The remnant had a burnt appearance. Before the close of the case, during an argument on a motion for a verdict in favor of the defendant made at the close of the plaintiff's evidence, this piece of paper was by the defendant offered in evidence in connection with Ballard's testimony, and was excluded, the court ruling that in the form in which it was, it was inadmissible without further evidence. This ruling was correct. Both the written and the printed matter on this paper were incomplete, and there was no evidence tending to explain its burnt and fragmentary condition as it came from the defendant's possession. The fragment showed the following words and parts of words: "contractor, not working, buil" and "office work & travell ." The claim of the company was that if this paper had been received "buil" would have signified building and "travell" would have denoted travelling, and that the applicant's written statement of his occupation would have been shown to be contractor, not working, building, and that his duties in that occupation were office work and travelling. If we assume this to be so, the defendant would have gained nothing by the admission of the fragmentary application. The application and policy construed in the light of the knowledge imputed to the company would have shown that the company insured Ward as a contractor and builder, not doing the actual work of building, but engaged in his office and in travelling about the duties of such a contractor and builder. With or without the restored application in the case, the "travelling" referred to as one of the duties of Ward's occupation was travel by the modes and conveyances ordinarily incident to the occupation of a contractor and builder not himself participating in the actual work of building or construction.

The policy by its terms did not cover injury or death "while or in consequence of riding in or on any locomotive," or, with an exception immaterial here, "while walking or being on the roadbed of any steam railway." The policy further provided that if the insured should be injured fatally or otherwise in any occupation or exposure more hazardous than that stated in the policy, the company should be liable only for the amount fixed for such increased hazard in accordance with the company's classification of risks. The declaration alleged among other things that Ward was killed solely by accidental means, by falling from an observation car. At the close of the evidence the defendant moved to have a verdict directed in its favor because the plaintiff had failed to make out a case under the allegation just referred to and, in substance, because of the foregoing provisions of the policy when applied to the evidence.

The claim that the plaintiff had failed to make out a case under his allegation is treated as equivalent to a claim that there was no evidence on which the plaintiff could go to the jury in support of the allegation. The motion was overruled and the defendant excepted.

The evidence tended to show that on the day of his death Ward was riding over the Rutland Railroad, in the Nehasane, an observation car as it may be called, though witnesses differed as to its proper designation. An examination of the whole testimony discloses that there was evidence fairly tending to show that at the precise time in question, Ward was travelling in said conveyance in pursuance of the occupation in which he was insured, and by the method of travel usual in that occupation and incident thereto. No one, so far as the evidence disclosed, saw Ward fall or saw him run over, but evidence tending to show the manner of his death is correctly summarized in the bill of exceptions, and the summary there given cannot well be abbreviated. We accordingly quote therefrom the following statement of the tendency of evidence on the part of the plaintiff: "That the observation car stopped for the purpose of permitting inspection of bridge No. 78 on said railroad, about six or eight feet before the bridge was reached from the front of said car, which was travelling in an easterly direction. That there were riding with Mr. Ward in said car, the bridge constructor, Badger, and the superintendent of the road, Parker;

that Parker and Badger left the car to go under the bridge, and when Mr. Ward was last seen alive, he was sitting in the observation car; that there were on the car a regular crew, in addition to the persons mentioned, consisting of conductor, brakeman, fireman and engineer; and that said car and engine constituted a train for the conveyance of people engaged as contractors and as officials of the road. That the said Badger and Parker proceeded under the bridge, and that Badger came out from under the bridge and motioned to the fireman to run the engine across the bridge, in order that observation might be made as to the effect on the bridge of the passage of the car over it; that before this signal to go forward was given, the engineer went on the ground to the front part of his engine to oil the same, and that Mr. Ward was not anywhere in front of the car; that upon the word from the fireman as communicated from Mr. Badger, the engineer took his place and looked carefully ahead of the car, and could see the track clear ahead of it and over said bridge, and that Mr. Ward was not on the said bridge at the time; that said bridge was about seventy feet span; that the fireman rang the bell fifteen or twenty seconds before starting the engine; that the conductor who, at the time of the stopping of the car, had gone forward of it about five or six hundred yards, looked around as the bell rang, and saw the car, and no one on the bridge or in front of it, and saw nothing of Mr. Ward; that the engine made a loud puffing noise when starting that could be heard a distance of two miles or more; that the car was so constructed that Mr. Ward could have remained in the interior of it and not be seen by the engineer or any of the other persons present, at the time the car was started across the bridge, or while it was running across the bridge; that Mr. Ward could have stepped to the front of the car at the time the signal for starting was given for the purpose of observing the bridge, and, as a matter of inference, that he accidentally fell from the car in front of it; that he was run over, and his head severed from his body; that after the car ran over the bridge Mr. Ward's body was found a little past the center of the bridge from the point where the car started, and about forty feet in front of where the car was standing at the time that it started; that after the car had started Mr. Badger and Mr. Parker saw his hat fall through the

bridge and his head followed and fell into the stream; that the hat struck the water before the head did, and was not on the head, but fell by itself; that just before the hat fell, Mr. Badger and Mr. Parker heard Mr. Ward make an outcry of fear, "Hold on there," which were the only words or outcry heard. That Mr. Ward's body was found lying across the track, between and parallel with the ties, his head having been cut off on one rail and his left foot partially run over on the opposite rail; that neither the track, the conditions of his body or his clothing, or the car indicated his having been pushed or dragged along the bridge at all. The dust from the ties was not disturbed, back of where his body was found, and no clothing was disarranged except the shoe and neckwear where his head was cut off; that there were marks on his head that might indicate that he fell so that his head struck upon the track in a way to render him insensible at once."

There was, as must be seen, nothing certain as to the manner of Ward's death, but it must also be seen that there was circumstantial evidence from which a jury might reasonably infer that he met his death in the way alleged in the declaration. This being so, the question was for the jury, although there was ground for an opposing inference. *Scofield's Admr. v. Ins. Co.*, 79 Vt. 161; *Tracy v. R. Co.*, 76 Vt. 313; *Clark v. Assurance Co.*, 72 Vt. 458; *Lazelle v. Newfane*, 69 Vt. 306.

It is contended that the observation car referred to was a locomotive, and that, therefore, the motion for a verdict should have been granted, even if, as the court holds, there was evidence tending to show that Ward met his death in the way alleged, because the policy provided that there could be no recovery for injury or death "while or in consequence of riding in or on a locomotive." The conveyance in which Ward rode was described by various witnesses, and a photograph of it was received in evidence and made a part of the exceptions. It appears that it consisted of a locomotive with a cab built over it, and on the whole we consider that in riding in this cab Ward was riding in or on a locomotive. But if, as there was evidence fairly tending to show, riding on such an observation car or locomotive as the "Nehasane" was a mode of travel covered by the insurance of Ward in travelling in his occupation as stated in writing, then the printed exception which is now under con-

sideration was an inconsistency and would not operate to defeat recovery. This was the view taken by the trial court, and is sustained by reason and authority. *Mascott v. Ins. Co.*, 69 Vt. 116; *Carlin v. Ins. Co.*, 57 Md. 515, 40 Am. Rep. 440; *Hall v. Ins. Co.*, 58 N. Y. 292; *Collins v. Ins. etc. Co.*, 79 N. C. 279, 28 Am. Rep. 322; *Whitemarsh v. Ins. Co.*, 16 Gray 359; *Maril v. Ins. Co.*, 95 Ga. 604, 30 L. R. A. 835; *Wheeler v. Ins. Co.*, 62 N. H. 450, 13 Am. St. Rep. 582.

If the occasion or cause of Ward's death was his walking or being on the roadbed of the railway, the plaintiff could not recover, since, if for no other reason, the declaration alleged a different occasion or cause of death. But as there was evidence fairly tending to show that the occasion or cause of death was as alleged in the declaration, and not walking or being on the roadbed, a verdict could not be directed on a ground which assumed that the accident was not caused as alleged in the declaration. *Bass v. Rublee*, 76 Vt. 377.

Again a verdict could not be directed for the defendant on the ground that Ward was killed in an occupation or exposure more hazardous than that in which he was insured, for, to reiterate in substance what has been said, there was evidence fairly tending to show that he was killed while in the occupation in which he was insured.

All the grounds of the defendant's motion for a verdict have been stated and given consideration, and the result of such consideration is a holding that the motion was rightly overruled.

Among other things the court charged the jury as follows: "But the policy insured Mr. Ward as a contractor and builder, in the office and travelling, and it is claimed on the part of the plaintiff that he was travelling at the time he was injured—travelling as a contractor and builder engaged in railroad work, and that he was using a usual and ordinary means of travel in that occupation. Now if that is so, the exception I have spoken of would not save the company, because if they having insured him as a contractor and builder, knowing through their agent that he was engaged, and had been for years, as a contractor and builder in railroad work as well as other work, and insured him while he was in his office and travelling, it is to be taken that that was insuring him while he was travelling in the usual and ordinary way of a contractor and builder engaged in rail-

road work. So that is a question of fact for you to consider,—was he at the time this accident occurred travelling as a contractor and builder engaged in railroad work in the usual and ordinary way of travel for one in that occupation, or in a usual and ordinary way? If you find that to be so by a fair balance of testimony, then the plaintiff is entitled to recover notwithstanding this provision that relieves the company from liability where the accident occurs in consequence of the assured riding on a locomotive.”

The defendant excepted as follows: “We are desiring exception as to what the court said, ‘if he was insured’ (I haven’t the language) ‘if he was insured as a contractor and builder and was travelling as a contractor and builder, it would not save the company.’ It was the expression you used last,—that portion of the charge you have referred to.” The defendant treats this general exception as applying to all that was said in the passage quoted, and insists that it assumes that the defendant insured Ward as a working contractor. But in speaking of Ward’s “work” the court very clearly meant nothing more than his “occupation.” This portion of the charge is also criticised on the ground that it left the case for the jury on certain claims of the plaintiff. But a reading of the whole charge shows that the case was submitted with entire fairness. In one respect there was a possible shortage in the instruction quoted, and this the court supplied by recalling the jury, referring to the passage quoted and saying to the jurymen: “I should have added to that, ‘and provided also that he was at that time in the pursuit of that occupation, engaged in that occupation.’ If he was out on a pleasure trip, of course what I have said would not be true. It occurred to me after you retired that I had not included that; so upon that branch of the case it will be necessary for you to find that he was at the time the accident occurred engaged in the occupation in which he was insured as a contractor and builder and travelling on that business.” After the charge was so modified the defendant took no exception. The exception to the charge avails nothing.

This policy was called an \$11,000 combination policy. According to its provisions, if the death of Ward was accidental and had occurred while he was riding as a passenger in a car provided for passengers carried for com-

pensation, the company would have been obliged to pay the plaintiff the sum of \$11,000, but the plaintiff's claim being, and his evidence having a tendency to show, that Ward's death was the sole result of accidental means while he was in the pursuance of the occupation in which he was insured, but not while he was being carried as a passenger for compensation in a regular passenger car provided for that purpose, the defendant, if found liable, was under obligation to pay not \$11,000 but \$5,000. Accordingly the declaration here went for the smaller sum, and the verdict was therefor, the matter of interest being taken into account.

After verdict and before judgment the defendant moved the court to set aside the verdict. This motion was overruled and the defendant excepted. The grounds of the motion were that there was no evidence tending to support the declaration and that the verdict was against the weight of evidence. The first ground raised a question of law which has already been considered and disposed of. On the second ground, namely, that the verdict was against the weight of evidence, the motion was addressed to the discretion of the trial court, and there being nothing to show that such discretion was not properly exercised no exception lies to the action of the court. *Marcy v. Parker*, 78 Vt. 73; *Coolidge v. Ayers*, 77 Vt. 448; *Jangraw v. Mee*, 75 Vt. 211; *German v. R. Co.*, 71 Vt. 70; *State v. Peach*, 70 Vt. 283; *Sowles v. Carr*, 69 Vt. 414; *Lindsay v. R. Co.*, 68 Vt. 556; *Stearn v. Clifford*, 62 Vt. 92; *Newton v. Brown*, 49 Vt. 16.

No question was raised as to the due execution of the policy, its issue, its renewal from time to time, the payment of premiums, the fact that Ward's death resulted from violent and external means, or as to the proof of death. All the questions fairly raised by the exceptions, and relied on, have been considered.

Judgment affirmed.

ADELARD THIBAUT v. CONNECTICUT VALLEY LUMBER CO.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed October 5, 1907.

Motion to Dismiss for Defective Service—Requisites.

A motion to dismiss for lack of proper service of the writ should specify in what respect the service is defective.

GENERAL ASSUMPSIT. Heard on motion to dismiss, at the March Term, 1907, Essex County, *Taylor, J.*, presiding. Motion overruled. Defendant excepted. The motion was:

"And now comes the said defendant, by its attorneys, Dale & Amey, who appear specially in said cause for this purpose, and moves this Honorable Court to dismiss said cause, for that the service of the original writ therein is not a lawful service of said writ upon said defendant according to the form of the statute in such case made and provided; as appears by the copy of record and appeal now on file in said court herein referred to."

The officer's return as amended, is:

"At Bloomfield, in said county, this 30th day of June; A. D. 1905, I then served this writ, and on the 30th day of June I continued the service of this writ by attaching as the property of the within defendant five hogs now in the buildings owned and occupied by the Connecticut Valley Lumber Company, in Bloomfield, Vt., and on the same day I sent to the town clerk's office in said town of Bloomfield a true and attested copy of this writ with a description of the property and estate so attached, with this my return endorsed thereon for record. And on the 30th day of June, at said Bloomfield, I delivered to L. Turcotte, known agent of the said defendant and a man of sufficient discretion to receive the same for the defendant, a like true and attested copy of said writ with a list and description of property and estate so attached and this my return thereon endorsed."

Amey & Hunt for the defendant.

The motion states that the writ was not served according to the statute in such case made and provided. It was not necessary to point out specifically that V. S. 1097 is the statute referred to, as the court notices said statute. The court also notices that the writ styles the defendant a corporation and that service was made upon "a known agent of said defendant and a man of sufficient discretion to receive the same for the said defendant." This case does not stand as did *Nye v. Burlington & L. R. Co.*, 60 Vt. 585. In that case the defect was in the writ, while here no question is made but that defendant is a corporation as set up in the writ.

H. W. Blake for the plaintiff.

"A motion to dismiss is in the nature of a plea in abatement." *Alexander v. School Dist.*, 62 Vt. 263; *Snow v. Carpenter*, 49 Vt. 426. A defendant who, after having received actual notice of the pendency of the action against him, seeks to abate the writ by defences of this nature, must take the risks incident to such defences, and not only point to a defect appearing upon the officer's return, but also show that the service shown by the return was the service in fact made, that no other service was made, that the defendant did not accept service, and that the defect has not been cured or waived. To this effect are the cases of *Barrows v. McGowan*, 39 Vt. 238; *Sumner v. Sumner*, 36 Vt. 105; and the *American Oak Leather Co. v. Bell & Clark Co.*, 70 Vt. 118, which holds such pleas bad for not presenting an issue, which if disposed of upon traverse, would be determinative of the claim raised; *Leonard v. McArthur*, 52 Vt. 439, holding that—"It was for the defendant to establish cause of ending the suit, and that in order to do so he must bring the matter before the court and have it prosecuted to issue, trial and judgment, according to the recognized law and the rules of procedure to that intent"; and *Conn. Pass. R. R. Co. v. Bailey*, 24 Vt. 465, and *Culver v. Balch*, 23 Vt. 618, holding that a motion to quash must be for causes apparent upon the face of the record, and if it does not appear by the record and is not necessary that it should so appear in order to

render the process valid, the motion cannot be sustained, and may well be demurred to. See *Harvey v. Hall*, 22 Vt. 211; *Gray v. Flowers*, 24 Vt. 533; *Dow v. School Dist.*, 46 Vt. 108; *Nye v. R. R. Co.*, 60 Vt. 585.

"The rule, applicable alike to motions and pleas in abatement, is that they must give the plaintiff a better writ, in that they not only point out the error, but also the method of correcting it." Gould Pl. Ch. V., §67; 1 Chit. Pl. 446.

WATSON, J. It is sufficient for the disposition of the case that the motion to dismiss does not point out in what respect the service of the writ was defective. *Nye v. Burlington & Lamoille R. R. Co.*, 60 Vt. 585.

Judgment affirmed and cause remanded.

JOSEPH O. DROUIN v. HENRY E. WILSON.

October Term, 1905.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed October 5, 1907.

Covenant Broken—Pleading—Non Fregit Conventionem—Bad but Aided After Verdict—Burden of Proof—Plea of Full Performance—Evidence—Cross-Examination—Experts—Landlord and Tenant—Lease—"Ordinary Wear and Tear" Defined—Broken Plate Glass Window—Tenant's Liability—Exceptions to Charge—Too General.

A plea of full performance to a declaration in covenant admits all matters well alleged and casts on defendant the burden of proving performance.

In an action for breach of the covenant in a lease requiring the lessee to surrender the premises in as good condition as they

were when taken, "ordinary wear and damage by fire or providential causes alone excepted," the breach assigned being the failure to replace a broken plate glass window, the plea, that defendant did surrender the premises in as good condition as they were when taken, ordinary wear and damage by fire or providential causes excepted, and that the plate glass window was broken by ordinary wear and damage by fire or providential causes, and not by any act or omission on defendant's part, is a plea of *non fregit conventionem*, and not a plea of full performance.

Though in an action of covenant, the plea *non fregit conventionem* is bad on demurrer, as it opposes a negative to a negative, yet it is not an immaterial plea, and so is sufficient to sustain a verdict.

In an action of covenant, the burden of proof on the issue made by the plea *non fregit conventionem*, which amounts to a traverse of such an essential allegation of the declaration that without it the covenant would not have been correctly stated, is on plaintiff.

Where the bill of exceptions states that defendant's plea is full performance, but an inspection of the plea itself shows it to be *non fregit conventionem*, this will be taken to have been pleaded and not that.

The phrase, "ordinary wear and tear," in the usual clause in a lease requiring the lessee to surrender the premises in as good condition as when taken, "ordinary wear and tear excepted" covers not only the gradual deterioration due to use, lapse of time, and the operation of the elements, but also a substantial injury suddenly sustained as the result of a structural defect.

The age, class, and general condition of the leased property when taken are to be considered in determining the liability of the tenant under his covenants.

Under his covenant to surrender the leased premises at the termination of the lease in the same condition as when taken, "ordinary wear and tear excepted," a lessee is not liable for injury to a large plate glass window sustained in the proper use of the leased building, and due to an insufficient foundation, or to an improperly constructed window-frame, there being no general covenant to repair.

In an action of covenant to recover for a broken plate glass window, under defendant's covenant in a lease to surrender the premises

in as good condition as they were when taken, "ordinary wear and tear excepted," where plaintiff testified that defendant had never said anything about paying for the window, and that the building had not heaved or settled, it was proper to allow plaintiff to be cross-examined as to defendant's offer if plaintiff would repair the window at once, as to an inability to bring the top of the door within the casing, and to defendant's repairs in that respect.

It was not error to allow a carpenter of thirty years' standing, who was somewhat experienced in setting and repairing plate glass, to give his opinion as to the cause of a break in a plate glass window.

An exception to the court's failure to comply with nine requests to charge, but without further designation of such claimed failure, is too general to be considered.

COVENANT. Pleas, *non est factum*, with notice, and *non fregit conventionem*. Trial by jury at the December Term, 1904, Caledonia County, Tyler, J., presiding. Verdict and judgment for the defendant. The exceptions merely state that the pleas were full performance and *non est factum* with notice, but do not refer to the pleas, nor make them a part of the exceptions.

The plaintiff excepted. Plaintiff having testified in direct examination, that the building had not heaved or settled, and that defendant never offered to repair the plate glass window, plaintiff, subject to his objection and exception, was allowed to be cross-examined as follows:

"Q. In that connection, did Mr. Wilson offer, if you would fix it up, so they could use it, and have the benefit of it during the lease, they would do something about it?

A. No, sir.

Q. Is that what you say now?

A. Yes, sir.

Q. And did Mr. Wilson have counsel there to look it over?

A. Yes, sir.

Q. But you did not learn anything of any proposition to fix it up?

A. Well, he requested me to fix it up, but I didn't. I did not want to. I didn't think I had any business with it.

Q. Had you been called upon to make repairs about that door, that shut right up to the casing of that glass, by Mr. Wilson?

A. I think so, yes, I believe that he was finding—

Q. Did you know that he had repairs made there?

A. I believe that he did.

Q. Don't you know that the trouble with that door was that he could not lock it, on account of its being so sprung up or down that the bolt of the lock would not enter the aperture in the casing?

Q. Do you know that that door, at the time of this accident, closed tight against the casing at the top, or substantially tight, and that it was sprung off so that the lock would not catch at all, when you got down to there, and sprung off clear through at the bottom?

A. I do not remember of that acting in that way.

Q. Do you know of anything that Mr. Wilson did, in the way of improperly heating or improperly caring for the store, that caused it to throw that door out of place?

A. I do not know anything about it. That or the door, anything more than I did the—as I have already explained, I know that they changed that door.

Q. Now then, Mr. Drouin, if that door did spring, the door which came against the same casing, which made the right-hand casing for this square of glass, if it did spring and twist and warp out of shape, is Mr. Wilson to blame for it, so far as you know?

A. I do not know—that door is right there to-day just the same. The same door is there."

Marshall Montgomery for the plaintiff.

To excuse the performance of an express covenant, it must be shown, either that it is a covenant prohibited by law, or that the performance of the covenant has become impossible by the intervention of causes which human agency could not prevent, or that the performance of the covenant has been prevented by the act of the covenantor himself. 2 Enc. L. & Prac. 1102;

Beebe v. Johnson, 19 Wend. 500, 32 Am. Dec. 518; *Polack v. Pioche*, 35 Cal. 416; *Ross v. Overton*, 2 Am. Dec. 552. Performance is not excused by inevitable accident or other contingency, though not foreseen by, nor within the control of the parties. *Cobb v. Harmon*, 23 N. Y. 148; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

The common law has always thrown the burden of repairs on the tenant. He was regarded in fact as a bailee of the premises, and bound to restore them substantially as he received them. 1 Taylor's L. & T., §§327, 343 and note, and 347; *Foster v. Botts*, 6 Mass. 63.

Under the lease, it was not the duty of plaintiff to make any repairs, but defendant was bound to keep the building in repair. *Gulliver v. Foster*, 64 Conn. 566; *Gallagher v. Britton*, 73 Conn. 172; *Abbott v. Jackson*, 84 Me. 449; *Foster v. Peyser*, 9 Cush. 242; *Prager v. Bancroft*, 112 Mass. 76; *McKean v. Cutler*, 156 Mass. 296; *Booth v. Mirriam*, 155 Mass. 527; *McLean v. Fiske*, 158 Mass. 472; *Birter v. Flagg*, 161 Mass. 504; *Elliott v. Aiken*, 45 N. H. 88; *Wilcox v. Cate et al.*, 65 Vt. 478; *Brown v. Burrington*, 36 Vt. 40; *Phillips v. Stevens*, 16 Mass. 238; *Holbrook v. Chamberlain*, 116 Mass. 155; *Ball v. Wyeth*, 8 Allen 275; *Libby v. Talford*, 48 Me. 316, 77 Am. Dec. 229; *Mumford v. Brown*, 6 Cowen 475; *Lockrow v. Horgan*, 58 N. Y. 635.

In covenant, where defendant pleads full performance, the burden of proof is on him. 2 Greenl. Ev. (4th Ed.) §247; *Scott v. Hull*, 8 Conn. 296; 1 Arch. Nisi Prius 439; *Monroe v. Smith*, 3 Doug. 279; 2 Taylor's L. & T., §684; 1 Greenl. Ev., §74.

Dunnett & Slack for the defendant.

The question of a witness's competency as an expert, is for the trial court and is not reversible if there is any evidence upon which to base an affirmative finding. *Watriss v. Trendall*, 74 Vt. 54; *McGovern v. Hays & Smith*, 75 Vt. 104; *Baker & Sons v. Sherman*, 71 Vt. 439.

If the injury to the window is a result of the imperfect construction of the building—from its being so constructed that it would settle and heave—or any other imperfection in the material or workmanship, then this injury is the "ordinary

wear'' incident to such imperfection. *Machen v. Hooper*, 21 Atl. 67 (Md.); *Hess v. Newcomber*, 7 Md. 325; *Howeth v. Anderson*, 78 Am. Dec. 538; *Warren v. Wagner*, 51 Am. Rep. 446; *Miller v. Morris*, 40 Am. Rep. 814; *Levy v. Dyess*, 51 Mass. 501; *Ball v. Wyeth*, 8 Allen 275; *Woods' Landlord and Tenant*, 2nd Ed., §373.

MUNSON, J. The defendant occupied the plaintiff's building under a lease which required him to surrender the premises in as good condition as they were in when taken, "ordinary wear and damage by fire or providential causes alone excepted." The suit is upon the covenants of this lease, and several breaches are assigned, of which the second, the only one now in contention, is the failure to replace a broken plate glass window.

The declaration alleges that the defendant did not surrender the premises at the expiration of the lease in as good condition as they were in when taken, ordinary wear and damage by fire or providential causes excepted; but on the contrary surrendered the premises badly out of repair, and with one large light of plate glass in the front side of the store utterly broken and of no value; and that the said plate glass window was not injured or destroyed by ordinary wear, or damaged by fire, or by providential causes; and so avers that the defendant hath broken his covenant.

To this the defendant pleads that he did surrender the premises at the expiration of the lease in as good condition as they were in when taken, ordinary wear and damage by fire or providential causes excepted; and further pleads as to the one large light of plate glass, mentioned specifically under the breach secondly assigned, that the said light of plate glass was broken by ordinary wear and damage by fire or by providential causes, and that said breakage was not caused by any act or omission on his part.

The defendant also pleaded *non est factum*, with notice that he would show that when the premises were surrendered they were in as good condition as when taken, ordinary wear and damage by fire or providential causes excepted; and that said premises were not then out of repair in any respect except that one large light of plate glass in the front side of the store was broken; and that said glass was broken without any action or

want of action on his part, but cracked in the course of the ordinary wear and use of the building, and that said crack and breakage were occasioned by the heaving and moving of the building by frost, and by the heaving and moving of the building in the ordinary wear and use of it in connection with fire kept therein in the winter time for the purpose of warming the store in the usual course of occupancy.

The court charged that the burden of proof was on the plaintiff; and the plaintiff excepted to this, saying that after he had shown the terms of the lease and the injury, the burden was on the defendant to show that the injury resulted from one of the excepted causes.

The exceptions say that the defendant pleaded full performance of his covenant, and the plea regarding the broken window has been treated in argument as a plea of performance. If this is the nature of the plea, the burden of proving it was on the defendant. A plea of performance admits all matters that are well alleged, and assumes the burden of proving performance. 1 Chit. Pl. 487, 487a, and note s; 5 Ency. Pl. & Pr. 378; Taylor L. & T. 684; *Scott v. Hull*, 8 Conn. 296; *Barnett v. Crutcher*, 3 Bibb. 202; *Harrison v. Park*, 1 J. J. Marsh. 170; *Marston v. Hobbs*, 2 Mass. 433; *Jones v. Johnson*, 10 Humph. 184.

But the pleas are before us, and we think the plea in question is a plea that the defendant has not broken his covenant—*non infregit conventionem*. It admits the fact set up as a breach, i. e. the leaving of a broken window unrepaired, but says that that did not constitute a breach because within one of the excepted clauses.

The plea *non infregit conventionem* is not a proper plea, because it pleads a negative to a negative, and two negatives do not make a good issue. But although an informal plea, it is not an immaterial one, and so is sufficient to sustain a verdict. It is held bad on demurrer, but good on motion in arrest. *Walsingham v. Comb*, 1 Lev. 183; 1 Sid. 289; 2 Keb. 51; *Pitt v. Russell*, 3 Lev. 19; *Boone v. Eyre*, 2 W. Bl. 1312; *Hodgson v. The East India Co.*, 8 T. R. 278; *Taylor v. Needham*, 2 Taun. 279; *Bender v. Fromberger*, 4 Dall. 436; *Roosevelt v. Heirs of Fulton*, 7 Cow. 71.

The question is, upon whom does the burden rest under this plea? The plea is in effect a traverse of the allegation that

the breaking was not due to any of the excepted causes, and alleges the facts relied upon to bring it within one of those causes. The allegation of the declaration thus traversed was an essential one, for without it the covenant would not have been correctly stated. The plea being in substance a traverse, the burden of proving the issue was on the plaintiff, and the charge in this respect was correct.

The plaintiff excepted to the charge that the defendant would not be liable if the breakage was due to the settling of the building, or to its imperfect construction. The charge on the last point was, in substance, that if the breaking of the glass was due to an improperly constructed frame, the defendant would not be liable, unless his attention had been called to the faulty construction, and unless he ought, in the exercise of ordinary care, to have remedied the defect.

The plate glass in question was six feet wide and twelve feet high, and was a part of the front of the store as originally constructed. It formed one side of a recess which led to the door, and the frames of the window and door were evidently connected and supported at the angle in the usual manner. The defendant claimed, in part, that there was a defect in the construction of the window frame which, in the proper and ordinary use of the building, subjected the glass to a strain that caused it to break.

The defendant was to return the premises in as good condition as they were in when taken, "ordinary wear * * excepted," and the scope of the phrase "ordinary wear" is involved in our inquiry. The plaintiff claims that broken windows are not within the fair meaning of the term, nor recognized as such by the cases. But the defendant contends that when the breakage is due to a defect in the construction of the building it is a part of the ordinary wear of such a building.

Among the plaintiff's citations are many cases which affirm that the principle of *caveat emptor* is applicable to contracts for the occupancy of tenements, and that the tenant takes the premises for better or for worse. But this is said in holding that there is no implied obligation on the part of the landlord to make repairs, and not as affording a guide to the construction of express provisions determining the duty of the tenant in that respect. It is not to be assumed that the tenant's

obligation is enlarged by the absence of any undertaking on the part of the landlord. There may be occasion for repairs which neither party can require the other to make. See *Brown v. Burrington*, 36 Vt. 40.

The term here is "ordinary wear," while the term used in certain cases to be referred to is "ordinary wear and tear"; but we doubt if any distinction need be made between the two expressions. An exception in either form will doubtless apply more naturally to the gradual deterioration which results from use, lapse of time, and the operation of the elements. But it has been held, and seems to be an accepted doctrine, that the words "ordinary wear and tear" will cover a specific and substantial injury suddenly sustained as the result of a structural defect. *Taylor L. & T.* 9 Ed., §360; 1 Wash. Real Prop. 2 Ed. 356; *Hess v. Newcomber*, 7 Md. 325; *Machen v. Hooper*, 73 Md. 342, 21 Atl. 67. The injury in the cases cited was the falling of a building because of an inherent defect. It was considered inconsistent to hold that a tenant not responsible for ordinary wear and tear was bound to replace a building that fell because of imperfect construction.

It is well settled that the age, class and general condition of the property when taken are to be considered in determining the liability of the tenant under his covenants. *Foss v. Stanton*, 76 Vt. 365; *Gutteridge v. Munyard*, 7 Car. & P. 129; 9 Eng. Rul. Cas. 474; *Lister v. Lane*, 2 Q. B. 212; 9 Eng. Rul. Cas. 478. In the case last cited the lessees of an ancient building covenanted to repair and maintain the premises as often as occasion should require. Before the expiration of the term one wall of the house bulged out, but nothing was done by way of repair. It was afterwards discovered that the foundation of the house was a wooden platform resting on a bed of mud, and that the bulging of the wall was caused by the rotting of the platform. It was held that inasmuch as the defect was caused by the natural operation of time and the elements upon a house the original construction of which was faulty, the defendants were not liable to make it good. In giving judgment it was said: "However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant."

In this case there is no general covenant to repair, and the covenant to surrender the premises in as good condition as they were in when taken is limited by the exception of ordinary wear. If this exception is considered too narrow to cover injuries resulting from structural defects, the principal clause, if not itself restricted by construction, will be given an effect altogether beyond its terms. The injuries might be such that they could not be repaired without rebuilding the structure or a substantial part of it. A construction of the covenant that would produce this result would be an unnatural construction of the provision as a whole. We think the injury to this plate glass, sustained in the proper use of the building, whether due to an insufficient foundation or to an improperly constructed frame, is not an injury for which the defendant is liable under his covenant, and that the plaintiff cannot complain of the charge given.

The defendant submitted nine requests to charge, and excepted to the failure to comply with the requests that were not complied with, but without designating any that he claimed were not complied with. This exception is too general to require consideration. *Luce v. Hassam*, 76 Vt. 450.

Defendant was permitted to ask the plaintiff in cross-examination a series of questions, part of which related to an offer of what defendant would do if plaintiff would repair the window at once, and part, to an inability to bring the top of the door within the casing and to the defendant's repairs in that respect. Both parts were permissible cross-examination of the plaintiff on statements made in his direct; the first on his statement that the defendant had never said anything about paying for the window; the second, on his statement that the building had not heaved or settled.

Dow, a witness for the defendant, who had discovered that the frame of the window was not square, was permitted to give his opinion as to the cause of the break. The witness was a carpenter of thirty years' standing, who had had some experience in setting and repairing plate glass, and it was not error to treat him as an expert.

Judgment affirmed.

A. ZANETTA v. HENRY BOLLES.

October Term, 1907.

Present: ROWELL, C. J., TYLEE, MUNSON, and WATSON, JJ.

Opinion filed October 16, 1907.

*Game Laws—Wild Deer on Enclosed Land in Closed Season—
Landowner's Property in Such Deer—His Right to Kill
Dogs to Protect Such Deer.*

The wild game of this State belongs to the inhabitants thereof in their collective and sovereign capacity, and not in their individual and private capacity, except so far as private ownership may be acquired therein under the constitutional provision that the inhabitants of the State "shall have liberty in seasonable times to hunt and fowl on lands they hold and on other lands not enclosed," under proper regulations to be thereafter provided by the General Assembly.

Since the statutory prohibition to hunt wild deer on his enclosed lands in the closed season is a proper regulation of his constitutional "liberty" to hunt and fowl thereon, an inhabitant of this State has, during the closed season, no such property in a wild deer on his enclosed land, which is there being attacked and worried by another's duly licensed, registered and collared dog, as entitles him to kill the dog, though that be necessary to save the deer's life.

TRESPASS for shooting a dog. Heard on an agreed statement of facts by the City Court of the city of Barre on May 6, 1907, *Scott, J.* Judgment for defendant to recover his costs. The plaintiff excepted. The agreed statement of facts is as follows:

"The plaintiff is a resident of the city of Barre, and was a resident of said city on December 26, 1905, on which day he went hunting rabbits in the town of Marshfield in said county of Washington, taking with him his beagle hound. The hound was duly licensed, registered and collared. The defendant is a resident of Marshfield, and was on said December 26, 1905.

Both plaintiff and defendant are citizens. On said 26th day of December the defendant heard the barking of dogs near the house, and going to the front of the house saw several dogs worrying a deer. The deer was standing in a brook with its fore feet on the bank of the brook. The defendant drove the dogs away and returned to the house, but the dogs renewed their attack on the deer, and he procured his rifle and shot at and killed the plaintiff's dog. The defendant killed the dog in order to protect the deer, and it was necessary to do so to save the deer's life. All of this took place within the enclosed lands of the defendant. The defendant did not know who owned the dog, and that the dog wore a collar upon which the name of the owner was marked. The plaintiff did not know that his dog would pursue deer, and used the dog only for rabbit hunting, and while out hunting rabbits at divers times previously with the said dog, came across fresh deer tracks, and that the dog took no notice thereof. On the day in question the plaintiff's dog had left him and attacked the deer without the knowledge of the plaintiff. The value of the plaintiff's dog was fifty dollars."

Elwin Scott and J. Ward Carver for the plaintiff.

The ownership of wild animals, so far as they are capable of ownership, is in the State, not as proprietor, but in its sovereign capacity as the representative of and for the benefit of all its people in common. Such animals become the subject of private ownership only so far as the people may elect to make them so. 40 L. R. A. 687, 59 N. W. 1098; *Geer v. Connecticut*, 161 U. S. 519; *Rexroth v. Coon*, 15 R. I. 35; *Jenkins v. Ballantine*, 8 Utah 245, 16 L. R. A. 689; 2 Kent Com. (4th ed.) 348; Blackstone Com. (1st ed.) 387; *State v. Redman*, 58 Minn. 398; 133 Ill. 469; *State v. Niles*, 78 Vt. 271; *Wagner v. People*, 97 Ill. 333.

S. Hollister Jackson for the defendant.

The deer was within the enclosed lands of the defendant. While it was there the defendant had a *transient property* in it, a property sufficient to give him the right to restrain any

stranger from taking it therein. Although this was a *qualified* property, nevertheless it was *property*. *State v. Niles*, 78 Vt. 271; 2 Blackstone Com. 394; 2 Am. & Eng. Enc. Law, 344, note 2; *Geer v. Conn.*, 161 U. S. 523. Having property in the deer, the defendant could defend it from the dog, to the extent of killing the dog. *King v. Kline*, 6 Pa. St. 318; *Aldrich v. Wright*, 53 N. H. 398; *Wadhurst v. Damme*, Croke's Rep. 45; *Barrington v. Turner*, 3 Lev. Rep. 28; 2 Am. & Eng. Enc. Law, 345.

ROWELL, C. J. The defendant, an inhabitant of the State, in the close season, shot and killed the plaintiff's duly licensed, registered, and collared dog while, with other dogs, it was worrying and attacking a wild deer on the defendant's enclosed land, and thereby saved the life of the deer. The defendant says that as he was an inhabitant of the State at the time, he had such a qualified property in the deer that he had a right to kill the dog in order to protect it. But that is not so. The wild game in the State belongs to the people of the State in their collective and sovereign capacity, and not in their individual and private capacity, except so far as private ownership may be acquired therein under the Constitution, subject to such proper regulations as the Legislature may make, the Constitution providing that the inhabitants of the State "shall have liberty in seasonable times to hunt and fowl on the lands they hold, and on other lands not inclosed," under proper regulations to be thereafter made and provided by the General Assembly. It is by virtue of this "liberty," and not otherwise, that private ownership is acquired in wild game by an inhabitant of the State on whose inclosed lands it is found; and it is thus acquired because the right to hunt thereon is exclusive in the inhabitant who holds them. *Payne v. Sheets*, 75 Vt. 335.

But as the defendant had no right to hunt wild deer on his inclosed land in the close season, a proper regulation of his "liberty," he had no property in the deer that entitled him to kill the dog to protect it.

Judgment reversed, and as the value of the dog is agreed upon at fifty dollars, judgment for that sum is rendered for the plaintiff with costs.

STATE v. A. ZONETTI.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed October 18, 1907.

*Game Laws—No. 130, Acts 1904—Dogs Running at Large—
Facts Not Within Statute.*

In a prosecution under No. 130, Acts 1904, providing that dogs of the breed commonly used for hunting deer, moose, or caribou, and dogs of other varieties that are known to follow deer, moose, or caribou, shall not be permitted by the owner or keeper thereof to run at large in the forests inhabited by such animals; and that, if any such dog be found hunting, pursuing, or killing any such animal, it shall be *prima facie* evidence of a breach of the statute by the owner or keeper, and, on conviction, subject him to a fine, it was error to adjudge the respondent guilty, where it appeared that his dog was a beagle hound, a breed that is bred and trained solely to hunt rabbits, and was never known before to hunt, pursue, or trail deer, and that neither moose nor caribou inhabit the forest in question.

INFORMATION against the owner of a dog for allowing him to run at large in violation of No. 130, Acts 1904. Heard on an agreed statement of facts at the March Term, 1907, Washington County, *Miles, J.*, presiding. Judgment, strictly *pro forma*, that the respondent is guilty. The respondent excepted. The following is the agreed statement:

"Zonetti, the respondent in the above entitled cause, on the 26th day of December A. D. 1905, was a resident of the city of Barre in the county of Washington and State of Vermont; that on the 26th day of December, 1905, the date alleged in the complaint, the respondent was the owner and keeper of a certain tan colored dog, viz.: a beagle hound; that said dog was duly licensed, and had a collar around its neck, with the name and residence of the said respondent, and the number of the license plainly marked thereon; that the respondent had complied with

all the requirements of the law, with reference to having said dog licensed, properly collared and numbered; that said beagle hound is of the breed of dogs that are bred and trained solely to hunt and pursue rabbits; are smaller in size than the fox hound, stag, or deer hound; that the respondent on divers occasions heretofore had used said dog in the hunting of, and in the pursuit of rabbits, and that said dog was never known to hunt, pursue, or trail deer; that on several occasions prior to the date alleged in said complaint, said dog had pursued and run rabbits in the woods where fresh deer tracks were plentiful, but never to the respondent's knowledge did the said dog ever trail, pursue, or hunt deer; that the respondent had hunted rabbits with the said dog in the same forests or woods in the said town of Marshfield, but that the respondent did not know and had no reason to know that said dog chased deer; that on the day in question, the respondent took said dog, which he tied to a sleigh, and drove to said town of Marshfield; that he took said dog and led him into forests or woods, and upon discovering fresh rabbit tracks allowed the dog to go in pursuit and on the track of said rabbit; that during the day the respondent shot several rabbits; that the last time the respondent saw said dog, he was on the track of, and in pursuit of a rabbit, but that some time later without the knowledge or consent of the respondent, said dog was seen in pursuit of deer in said forests in said town of Marshfield; that the respondent had no knowledge of the fact that said dog was on the trail of a deer at the time he was seen by others in the alleged pursuit of said deer; that there are certain forests or woods in the said town of Marshfield, but no moose or caribou inhabit said woods or forests; that deer are frequently seen in said forests or woods in said town of Marshfield."

Richard A. Hoar for the respondent.

Respondent's dog was not "running at large" within the meaning of the statute. That phrase means strolling without restraint or confinement, or wandering, rambling, or roving at will, unrestrained. As was said in *Wright v. Clark*, 50 Vt. 130, "The trained hound when pursuing the fox or deer with, and at his master's bidding, is no more strolling without re-

straint, or wandering, rambling, or roving at will than a boy while going on an errand at his master's command * * *'
Presuall v. Raney, (Tex.) 27 S. W. 200; *Smith v. Kansas City et al.*, 58 Iowa 622; *Stephenson v. Ferguson*, 30 N. E. 714; *Juliene v. City of Jackson*, 69 Miss. 34; *Montgomery v. Breed*, 34 Wis. 649; *Cole v. Burns*, 21 Hun. 246.

Benjamin Gates, State's Attorney, for the State.

The agreed statement shows that, under the decisions of this Court, respondent permitted his dog to hunt and pursue the deer in question, that he allowed the dog to get beyond his control. *State v. Niles*, 78 Vt. 266; *Russell v. Cone*, 46 Vt. 600; *Wright v. Clark*, 50 Vt. 130; 26 Minn. 154; 2 Cyc. 443-444; *Jennings v. Wing*, 63 Me. 468; *Bruce v. White*, 4 Gray 345; *Com. v. Dow*, 10 Met. 482.

ROWELL, C. J. The statute is that dogs of the breed commonly used for hunting deer, moose, or caribou, and dogs of other varieties that are known to follow deer, moose, or caribou, shall not be permitted by the owner or keeper thereof to run at large in forests inhabited by such animals; and that if any such dog shall be found hunting, pursuing, or killing any such animal, it shall be *prima facie* evidence of a breach of the statute by the owner or keeper, and, on conviction, subject him to a fine.

But the agreed facts on which the respondent was adjudged guilty below do not bring his dog within the statute, for they do not show that it belonged to a breed commonly used for hunting deer, moose, or caribou, nor that it belonged to any other variety that is known to follow those animals; but on the contrary they show that it was a beagle hound, a breed that is bred and trained solely to hunt and pursue rabbits, and was never known before to hunt, pursue, or trail deer, and that neither moose nor caribou inhabit the forest in question.

Judgment reversed; judgment that the respondent is not guilty, and he is discharged and let go without day.

MOSES FERTEL v. GEORGE PECK.

October Term, 1907.

Present: TYLER, MUNSON and WATSON, JJ., and WATERMAN,
SUPERIOR J.

Opinion filed October 18, 1907.

Negligence—Injuries from Negligent Driving—Evidence—Sufficiency—Contributory Negligence as Matter of Law—Question for Jury—Instructions.

In an action for injuries caused by defendant's alleged negligence in driving against plaintiff while he was working on a public street evidence considered and held, that it tended to show that defendant was negligent, as alleged; that it could not be said, as matter of law, that plaintiff was guilty of contributory negligence in failing seasonably to notice and avoid defendant's approaching team; and that, therefore, the court rightly submitted those questions to the jury.

The court, in addition to proper general instructions regarding plaintiff's duty in the circumstances, called the jury's attention to the fact that plaintiff must have known that there were liable to be more teams than usual on the street that day, and to the fact that he had been cautioned by his superior to look out for teams while at work, and put the inquiry whether, in the circumstances, plaintiff was negligent in not knowing that defendant's team was coming. Held, that defendant was entitled to no further instruction as to plaintiff's duty to look out for approaching teams.

CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1906, Washington County, Rowell, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. At the close of all the evidence, the defendant moved for a directed verdict in his favor for that there was no evidence tending to show unskillful driving on his part; that there was no evidence tending to show negligence on his part; and that, on the evidence, plaintiff, as matter of law, was guilty of con-

tributory negligence. This motion was denied, to which ruling the defendant excepted.

Fred L. Laird for the defendant.

John Wing and *C. H. Senter* for the plaintiff.

MUNSON, J. There was evidence tending to show that whenever defendant's horse came near an approaching electric car it would start up suddenly and run past the car, and that it was uncontrollable in this respect; that defendant had owned the horse over a year, and had very often driven it through the streets where the cars ran, and knew how it acted at these times; that on the occasion when plaintiff received his injury, the defendant, while still at some distance, saw the plaintiff's party at work between the car track and the curb, and beyond them an approaching street car; that he kept on at ordinary driving speed, and thus brought the passing of his team and the car at the point where the men were working,—when for aught that appeared he might, by lessening his speed, have brought the meeting at a point where no one would have been endangered. This was evidence tending to show that the defendant did not take the care that a prudent man would have taken in driving such a horse in such circumstances.

There was also evidence tending to show that plaintiff's position with his back to teams coming from one direction was required by his work; that he could not be working and watching for teams from the rear at the same time, but that once in a while he would look around; that others working with him did the same, and that some of these saw the defendant's team and warned him; that he started towards the gutter, but did not have time to escape from the team, which passed the car in the manner before described. In view of this evidence, it could not be said as matter of law that the plaintiff was guilty of contributory negligence. So the defendant was not entitled to have a verdict directed on either branch of the case.

The defendant excepted to the failure to charge the jury "that it was the duty of the plaintiff to be on the alert and look out for approaching teams, taking all the conditions into consideration." The court, in addition to proper general in-

structions regarding the plaintiff's duty, called attention to the fact that the plaintiff must have known that there were liable to be more teams than usual on the street that day, and to the fact that he had been cautioned by his superior to look out for teams when at work, and put the inquiry whether in the circumstances surrounding him he was guilty of negligence in not knowing that the team was coming. This was all the defendant was entitled to in the line indicated by the exception.

Judgment affirmed.

FRANCIS BATCHELDER & COMPANY v. HIRAM B. WEDGE.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed October 21, 1907.

*Replevin—Bankruptcy—Attachments of Four Months' Standing
—Status.*

Where a petition in bankruptcy was filed more than four months after the bankrupt's property had been attached on suits then pending, such attachments constituted liens that were not invalidated by the subsequent adjudication of bankruptcy, and were paramount to the rights of a trustee in bankruptcy, or of a receiver of the bankrupt's property appointed after such adjudication.

Since it appears that the receiver sold plaintiff only the bankrupt's interest in the attached property, and that before and at the time of the sale plaintiff was notified of the attachments, the question of the rights of an innocent purchaser of the attached property for value are not involved.

REPLEVIN for goods taken by defendant by virtue of an attachment. Heard on an agreed statement at the March Term, 1907, Washington County, *Miles, J.*, presiding. Judgment for the defendant to recover one cent damages and his costs, and for the return of the property. The plaintiff excepted. The following is the agreed statement:

"The Hobart Farm Company, a corporation duly organized and chartered under the laws of the State of New Hampshire, had its principal office and place of business in Boston, in the Commonwealth of Massachusetts. Said business of said corporation consisted in dealing in dairy products and making butter, and said company owned, and operated and conducted a creamery establishment duly equipped with the necessary machinery hereinafter mentioned, at what is known as 'Berlin Corners,' in the town of Berlin, and State of Vermont. The personal property of the said company consisted of, and is, the same property described in the plaintiff's writ of replevin, and is the same property involved in this suit. The aforesaid company, in April, 1903, was petitioned into bankruptcy, and was thereupon duly adjudged bankrupt, and a receiver appointed and qualified to take charge of all the business and property of the said company, and settle the estate of the said company in accordance with the requirements of the bankruptcy law applicable thereto.

On the 3rd day of February, 1902, F. R. Whitlaw, then a resident of Berlin, but now of Randolph, this State, brought his suit against the said Hobart Farm Company, and on the same day the writ was duly served, and all of the property of the said Hobart Farm Company, in said Berlin, consisting of both real and personal property, was then and there attached, said personal property being all and the same property replevied in this action. Said writ was returnable into the City Court of Montpelier, at which time the case was continued until March 19, 1902, when judgment in said cause was rendered for the plaintiff, and the defendant in said cause (the Hobart Farm Company) thereupon took an appeal and said case passed to the Washington County Court, where it remained until the March term of said court, 1905, when judgment was rendered for the plaintiff to recover the sum of \$226.49 damages, and \$45.25 costs, amounting in all to \$271.74. Also, that on the 12th day

of February, 1902, L. Chatfield, of said Berlin, brought suit against the said Hobart Farm Company by virtue of his writ of attachment prayed out of said court of the said city of Montpelier, which writ was served on the said Hobart Farm Company on the 13th day of February, 1902, and thereupon attached all of the property of the said bankrupt company, being the same property that was attached by the said Whitlaw as aforesaid. Said writ was returnable to the said City Court of said city of Montpelier on the 23rd day of April, 1902, at which time judgment was entered against the said Hobart Farm Company, and thereupon the said company appealed the said cause, and accordingly the same passed to the Washington County Court and was then continued from time to time until the March term of said County Court, 1905, when judgment was rendered for the plaintiff to recover \$236.29 damages and \$40.81 costs, amounting in all to \$277.10. In each of the above mentioned causes, execution was issued on the first day of June, 1905, and both of said executions were placed in the hands of the defendant, Hiram B. Wedge, as deputy sheriff of Washington County, to serve and return make according to law, and the said deputy sheriff in pursuance of said executions, levied on and took possession of all the personal property attached as aforesaid, and was about to sell the same under said execution, when the plaintiff herein, by virtue of its writ of replevin, dated on the 11th day of July, 1905, replevied said goods from the defendant herein. Said writ was duly served on the 12th day of July of the same year, and, accordingly, all of the personal property herein mentioned was replevied from the said defendant, Hiram B. Wedge. That after the receiver of the said Hobart Farm Company, bankrupt, was duly appointed and qualified, he, on the sixth day of October, 1904, petitioned the Circuit Court of the District of Vermont, as receiver of said company for permission to sell the property of the said bankrupt for the purpose of settling the estate of the said bankrupt company, which petition was duly entered in said court, and permission granted said receiver by said court to sell said property at public auction. And said receiver, in accordance with the directions of said court, advertised said property, and sold it at public auction, at Berlin, at the same place and on the same premises that the said Hobart Farm Company occupied while

conducting the business of the said bankrupt company, notice being given then and there to said plaintiff before and at the time of said sale of this said attachment of said Whitlaw and Chatfield on said property, and the receiver then and there on the 18th day of November, 1904, and before the executions herein referred to were issued, sold all the right and title and interest of the said Hobart Farm Company in and to said property in Berlin, which is the same personal property involved in this suit, upon which the said Whitlaw and the said Chatfield claimed to hold an attachment, and at the aforesaid sale the plaintiff herein purchased said property and paid for the same, and now claims the right to hold said property as owner thereof, and after the aforesaid purchase of said property by the plaintiff herein, the defendant deputy sheriff, by virtue of the aforesaid executions, levied upon said property, and this suit was brought to obtain rightful possession of all of said personal property as described in said writ, and accordingly the plaintiff asks judgment for nominal damages and costs, together with the rightful possession of the said property by reason of the aforesaid purchase of said property from the receiver at said public sale."

M. M. Gordon and Earl R. Davis for the plaintiff.

The Bankruptcy Act, section 67f, provides that all judgments obtained through legal processes at any time within the prescribed period of the bankruptcy of the debtor shall be deemed null and void and the property affected by the judgment, levy, attachment or other liens shall be deemed wholly discharged and relieved from the same and shall pass to the trustee as part of the estate of the bankrupt. *Wilder v. Weatherhead et al.*, 32 Vt. 765; *In re Tobias et al.*, 5 Am. B. Rep. 326; *In re Johnson*, 6 Am. B. Rep. 202.

Fred A. Howland and William N. Theriault for the defendant.

The attachments were made more than four months prior to the bankruptcy of the Hobart Farm Company and the liens created by the attachments were therefore not affected by the

bankruptcy proceedings. Loveland on Bankruptcy, 3rd ed., 545; Brandenburg on Bankruptcy, 3rd ed., §1114; *In re Snell*, 125 Fed. 154, (11 Am. B. Rep. 35); *In re English*, 122 Fed. 114; *In re Knight*, 125 Fed. 42; *Clarke v. Larromore*, 188 U. S. 488; *Metcalf Bros. v. Barker*, 187 U. S. 165, (9 Am. B. Rep. 36); *Continental Bank v. Vakatz*, 1 Am. B. Rep. 19; *In re Blumburg*, 1 Am. B. Rep. 633; *In re Dunavant*, 3 Am. B. Rep. 41; *Taylor v. Taylor*, 4 Am. B. Rep. 211; *In re Pease*, 4 Am. B. Rep. 547; *Doyle v. Heath*, 4 Am. B. Rep. 705; *In re Blair*, 6 Am. B. Rep. 206 and note; *In re Beaver Coal Co.*, 6 Am. B. Rep. 404; *Pepperdine v. Bank of Seymour*, 10 Am. B. Rep. 570.

WATSON, J. A lien was created by each of the attachments more than four months prior to the filing of the petition in bankruptcy. Under section 67f of the Bankrupt Law of 1898, these liens were not invalidated by the adjudication. The case of *Thompson, Trustee, v. Fairbanks*, 75 Vt. 361, 56 Atl. 11, is decisive of this question. There a chattel mortgage of more than four months' standing at the time of the filing of the petition in bankruptcy, and good at common law between the parties, was involved. To perfect his lien on the property, the mortgagee took possession thereof under his mortgage within four months prior to the filing of the petition. It was held that the mortgage lien was not invalidated by the adjudication, and that it was paramount to the rights of the trustee under the bankrupt law. The decision of this Court was affirmed by the Supreme Court of the United States,—196 U. S. 516, 49 L. ed. 577,—where it was further held that under the present bankrupt act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition as the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except where there has been a conveyance or encumbrance of the property, which is void as against the trustee by some positive provision of the act.

It is further argued by the plaintiff that the question is also raised whether the attachments created liens good against an innocent purchaser of the property for value at a public sale by the receiver of the bankrupt company appointed by the Circuit Court of the United States and selling under a special order

from that court. But the case does not present that question. The record states that before and at the time of the sale notice was given to the plaintiff of the attachments, and that the receiver sold only "the right and title and interest" of the bankrupt in the property.

Judgment affirmed.

NEWELL C. WRIGHT v. ADEN C. TEMPLETON.

October Term, 1907.

Present: TYLER, MUNSON, and WATSON, JJ., and WATERMAN,
SUPERIOR J.

Opinion filed October 21, 1907.

*False Imprisonment—Officers—Justification Under Process—
Requisites—Necessity of Return—Illegal Commitment—
Trespasser Ab Initio—Immaterial Special Verdict.*

An officer cannot justify under a returnable process unless he shows its return.

In an action for false imprisonment it appeared that defendant, a duly qualified deputy sheriff, arrested plaintiff on warrants charging criminal offences and returnable forthwith before a justice of the peace at Barre, took plaintiff to Barre, but not before the justice, thence took him to Montpelier where he lodged him in jail, not for safe keeping so that he could be taken by defendant before the subscribing justice, but so that defendant could confer with the state's attorney; that plaintiff remained in jail for about three hours when he was released by defendant who, by direction of the state's attorney, then notified plaintiff that said proceedings before the justice were dropped, and arrested him on other warrants issued against him from county court. *Held,*

that on making the arrest it was defendant's duty to take plaintiff before the subscribing justice of the peace, as commanded in the warrants, and that the taking of him to Montpelier for said purpose was such an abuse of process as made defendant a trespasser *ab initio* and rendered him liable for false imprisonment, as matter of law.

TRESPASS for false imprisonment. Pleas, the general issue, with notice of justification under two warrants issued by a justice of the peace, on complaint of the state's attorney, charging criminal offences. Trial by jury at the March Term, 1906, Washington County, *Rowell, J.*, presiding. No general verdict was submitted. The jury were only asked to assess the damages on the basis that defendant was a trespasser *ab initio*, which they did at \$360; and to answer the question whether it was a reasonable and proper thing for the defendant to do, in the circumstances, to take the plaintiff to Montpelier and keep him there instead of keeping him at Barre, which they answered in the affirmative. Judgment on the verdicts for the plaintiff to recover \$360 damages and his costs. The defendant excepted. The warrants under which defendant justified were returnable "forthwith."

Senter & Senter for the defendant.

The judgment was erroneous.

"In cases of arrest at night, or on Sunday or other holiday, and in many other cases, it becomes necessary for an officer to confine his prisoner temporarily until he can bring him before a magistrate. In such case, being personally responsible for his prisoner, he may confine him in any safe and suitable place which is most convenient. Ordinarily he ought to take him to the county jail, and the keeper of the jail is bound to receive him, even in cases of arrest without warrant for a breach of the peace in the presence of the officer." Hawley's *The Law of Arrest*, 54.

George W. Wing and *John W. Gordon* for the plaintiff.

By failing to take the plaintiff before the justice of the peace who issued the warrants, as therein commanded, and by

lodging him in jail at Montpelier, defendant became a trespasser *ab initio*; and makes no difference in this regard that defendant's failure is a nonfeasance. *The Six Carpenters' Case*, 8 Co. 8 prt. 146; *Benders v. Wilder*, 16 Vt. 393; *Briggs v. Gleason*, 29 Vt. 78; *Colby v. Jackson*, 12 N. H. 526; *Hall v. Ray*, 40 Vt. 576; *Sutton v. Beach*, 2 Vt. 42; *Collins v. Perkins*, 31 Vt. 624; *Lamb v. Day*, 8 Vt. 624; *Eaton v. Cooper*, 29 Vt. 444; *Kenerson v. Bacon*, 41 Vt. 573; 19 Cyc. of Law & Pro. Tit. False Imprisonment, 353; *Tryon v. Pingree*, 67 Am. St. Rep. 419; *Morris v. Wise*, 2 F. & F. 51; *Phillips v. Fadden*, 125 Mass. 198.

It cannot be questioned that when a person is arrested either with or without a warrant, it becomes the duty of the officer or the individual making the arrest to convey the prisoner in a reasonable time and without unnecessary delay, before a magistrate to be dealt with as the exigency of the case may require. The power to make the arrest does not include the power to unduly detain in custody; but on the contrary is coupled with a correlative duty, to take the accused before a magistrate "as soon as he reasonably can." 1 Hill'd, Torts, 223, §19; *Wright v. Court*, 4 B. & C. 596; *Firestone v. Rice*, 71 Mich. 377; *B. & O. R. R. Co. v. Cain*, 81 Md. 87; *Twilley v. Perkins et al.*, 77 Md. 252; *Rohan v. Sawin*, 5 Cush. 281; Com. Dig. Imprisonment, H. 4.

"Even if the arrest had been lawful the officers would have had no right to prolong the imprisonment beyond the doors of the lock-up for the purpose of sending the plaintiff out of town, and would have been liable, whether they had a right to release him without bringing him before a magistrate or not." *Bath v. Metcalf et al.*, 145 Mass. 274; *McCloughan v. Clayton*, Holt N. P. 478-80; 1 Hale B. C. 592; *Brock v. Stimson*, 108 Mass. 520; *Wood v. Graves*, 144 Mass. 365.

WATSON, J. The defendant undertakes to justify under two warrants issued by a justice of the peace upon complaints of the state's attorney of the county charging criminal offences. The warrants commanded the officer serving the same to apprehend the plaintiff and have him forthwith before the subscribing justice at Barre. The plaintiff was arrested on the warrants by the defendant, a legally qualified deputy sheriff, at

Groton about nine o'clock in the evening of October 8, 1899, and taken to Barre, arriving there between the hours of five and six the next morning.

After a short stop in Barre, and without taking the plaintiff before the justice of the peace who issued the warrants, and without communicating with the state's attorney then at his home in Barre, the defendant took the plaintiff to Montpelier, and when there placed him in jail for safe keeping. Later in the forenoon warrants were issued against the plaintiff from the county court, then in session, on informations filed therein for the same offences. These warrants were put into the defendant's hands by the state's attorney at Montpelier, near ten o'clock, with directions to notify the plaintiff that the proceedings before the justice were dropped, and then to arrest him on the new warrants. Thereupon the defendant let the plaintiff out of jail, notified him as directed by the state's attorney, and arrested him on the warrants issued by the county court. This was ten o'clock or a little after, the plaintiff having been in jail not far from three hours.

The special question submitted to the jury, "Was it a reasonable and proper thing in point of fact for the defendant to do in the circumstances, to take the plaintiff to Montpelier and keep him there instead of keeping him at Barre?" was answered in the affirmative. This finding, however, is immaterial, since the record shows that the plaintiff was not taken to Montpelier for safe keeping until he could be taken by the defendant before the subscribing magistrate, as commanded in the warrants, but in fact was taken there so the defendant could confer with the state's attorney as to what further to do with the plaintiff. Whether the defendant had authority so to do is not a question of fact, but one of law.

On making the arrest it was the duty of the defendant to take the plaintiff before the subscribing justice of the peace as commanded in the warrants. 2 Hale, P. C. 112. In *Ellis v. Cleveland*, 54 Vt. 437, it was held that an officer could not justify under a returnable process, unless he show its return; for he is commanded to return the writ, and he shall not be protected by it without showing that he has paid due and full obedience to its commands. To the same effect is *Gibson v. Holmes*, 78 Vt. 110. True, in each of these cases the arrest was

on civil process. Yet the same doctrine applies in case of a warrant in criminal process. This was expressly held in *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744.

The taking of the plaintiff to Montpelier for the purpose shown was such an abuse of process as made the defendant a trespasser *ab initio*. Consequently the fact that the plaintiff's subsequent discharge, there, from that arrest was by the direction of the state's attorney, does not relieve the defendant from liability in this action.

Judgment affirmed.

CRESCENT G. BOLTON v. CHESTER B. OVITT.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed October 22, 1907.

Master and Servant—Injuries to Servant—Extraordinary Risk—Master's Liability—Youth and Inexperience of Servant—Effect as to Assumption of Risk—Evidence—Judicial Notice—Pain and Suffering—Incapacity—Servant's Age and Size—Improper Argument.

In an action by a boy about ten years old for injuries received while employed by defendant in poking corn from an ensilage-cutter to the carrier that was filling a silo, plaintiff's evidence tended to show that during the third day of his work in consequence of the loss of a nut that held a cap that covered the knives and the cogwheels of the machine, and by defendant's direction, who cautioned him to be careful and not get hurt, plaintiff crossed his hands, held the cap in place with his left hand and poked the corn with the other, and that, when he had worked so about

twenty minutes in full view of defendant, the mitten on his left hand caught in the wheels and drew his hand into the cogs, inflicting the injuries complained of. *Held*, that the risk incident to holding the cap in place was an extraordinary risk, and so not assumed by plaintiff, unless he knew and comprehended it and how to avoid it, or it was so plainly observable that he will be taken to have known and comprehended it and how to avoid it, and the burden was on plaintiff to show nonassumption of the risk.

Whether plaintiff should be taken to have assumed the risk depends on whether he understood the danger from which his injury resulted; and if yes, whether he had sufficient mental and physical capacity to regulate his conduct in a manner adapted to secure his safety as effectually as the circumstances admitted.

Plaintiff's tender age and consequent lack of experience tended to show such want of the mental and physical capacity requisite to charge him with having assumed the risk, as made assumption of risk a question for the jury; and in determining it, the jury had a right to consider plaintiff's appearance in court and on the stand.

As plaintiff's tender age and consequent lack of experience tended to show his physical inability to perform the required work, he thereby questioned that he had such ability, therefore, his mother was properly allowed to testify that he "had grown a good deal" since the accident.

Plaintiff's age and size was notice to defendant that he had not the capacity of a mature person for the work in question, and it was proper to allow his counsel so to argue to the jury, for, although there was no evidence that defendant knew plaintiff's exact age when he hired him, he had known him since he was a small boy, and had seen him around a good deal since he was old enough to be around with other boys.

Any improper statements that plaintiff's counsel may have made, in arguing to the jury that plaintiff's age and size was notice to defendant of his incapacity, were so promptly and adequately dealt with by the court and so fully withdrawn by counsel as to rid the minds of the jury of any wrong impression therefrom.

That which is known need not be proved, and so it need not be proved that a severe injury to the hand causes pain.

It was within the discretion of the trial court to allow plaintiff first to claim damages for pain and suffering in the closing argument to the jury.

CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1907, Franklin County, *Haselton, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. At the close of all the evidence the defendant moved the court to direct a verdict in his favor "because on the undisputed evidence in the case the plaintiff was not entitled to recover, claiming that the plaintiff had failed to establish the material allegations in the declaration that the plaintiff did not comprehend or understand the dangers incident to his employment; that in the absence of proof of this fact, it must be said that the plaintiff assumed the risk incident to the employment. Also claiming that the plaintiff had failed to establish that the instructions as given the plaintiff were not proper and sufficient and not comprehended and understood by him." This motion was denied, to which the defendant excepted.

This is case for negligence, to recover for personal injuries to the plaintiff, a lad between nine and ten, while working for the defendant cutting corn with an ensilage-cutter and filling a silo. His work was, to stand between the power and the cutter, and poke the corn with a stick from the cutter to the carrier. The knives, and the cog-wheels on the side of the cutter, were covered with an iron cap or hood. The plaintiff's evidence tended to show that during the third day of his work, a nut that held a cap came off, and that they stopped the machine to find it, but started it up without putting the nut back; that the defendant, who was feeding the machine, directed him to hold the cap in place with one hand near the cog-wheels, and poke the corn with the other hand, telling him to be careful and not get hurt; that he did as directed, by crossing his hands, putting his left hand on the cap and poking corn with the other, and worked so about twenty minutes in full view of the defendant, when the mitten on his left hand caught in the wheels and drew his hand into the cogs, when his thumb was broken and bruised, and his hand otherwise so injured that he lost part of it and two fingers. The plaintiff's evidence further tended to show that he never had any experience in such work before.

The defendant's evidence tended to contradict the plaintiff's evidence as to holding down the cap, and to show that the plaintiff had done the same kind of work for him the year

before, not as a hired servant, but had spelled his boys to the extent of poking away several loads of corn; that during the fall of 1905, he used this cutter in filling three silos, and that the plaintiff was around two-thirds of the time, and had opportunity to see and observe the cutter in operation; and that at the time he employed the plaintiff, he gave him a stick to use, and told him to keep his hands away from the machinery in question, to prevent injury. No witness was introduced on either side to show that the plaintiff was not able to do the work. He was in court during the entire trial, and testified on the stand.

Emmet McFeeters and C. G. Austin & Sons for the defendant.

A verdict should have been directed for defendant because there is no evidence that plaintiff did not comprehend the instruction and caution given him by defendant. And because plaintiff failed to establish the necessity of further instructions as to the character of the risk, and failed to show that defendant did not give such further instructions. *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Ciriack v. Merchants Woolen Co.*, 146 Mass. 182; *Williamson v. Sheldon Marble Co.*, 66 Vt. 427.

The plaintiff having failed to establish (a) that he did not comprehend or understand the dangers incident to the employment in which he was engaged; (b) the need of further instructions or words of caution respecting the dangers of his employment; (c) that the caution given him by the defendant was not sufficient in the circumstances; (d) that he did not understand or comprehend such instructions or words of caution as he received from the defendant; and (e) that he did not know, comprehend or understand the danger of his not obeying the same, a verdict should have been directed for the defendant. *Chicago etc. Co. v. Reineiger*, 140 Ill. 334; *Russell v. Tillotson*, 140 Mass. 201; *Cheney v. Middlesex Co.*, 161 Mass. 296; *O'Conner v. Whittall*, 169 Mass. 563; *Silvia v. Sagamore*, 177 Mass. 476; *Brazil Block Coal Co. v. Gaffney*, 4 L. R. A. 850; *Buckley v. Gutta Percha Mfg. Co.*, 113 N. Y. 540; *Mundhenke v. Oregon etc. Co.*, 1 L. R. A. 278; *Tagg v. McGeorge*, 155 Pa. 368; *White v. Witteman etc. Co.*, 131 N. Y. 631; *Bible Mfg. Co. v. Taylor*,

95 Ga. 615; *Mather v. Rillston*, 156 U. S. 361; *Downey v. Sawyer*, 157 Mass. 418.

Elmer Johnson for the plaintiff.

In determining whether plaintiff acted with reasonable care and prudence, account should be taken of plaintiff's age and size. *Laflam v. Missisquoi Pulp Co.*, 74 Vt. 125.

ROWELL, C. J. The risk of holding the cap in place with his hand was not an ordinary risk incident to the work the plaintiff was hired to do, for the cap was not made to be held in place by the hand, but by a nut on a bolt; and when the defendant set the plaintiff to holding the cap with his hand, he subjected him to an extraordinary risk, and one that the plaintiff did not assume, unless he knew and comprehended it and how to avoid it, or it was so plainly observable that he will be taken to have known and comprehended it and how to avoid it; and the burden was on the plaintiff to show non-assumption, we will say for present purposes. But whether he was to be taken to have assumed that risk, was an open question, depending upon whether he understood the danger from which his injury resulted; and if yes, whether he had sufficient mental and physical capacity to regulate his conduct in a manner adapted to secure his safety as effectually as the circumstances admitted. The defendant says there was no evidence tending to show want of understanding and capacity in these respects, and that therefore his motion for a verdict should have been sustained. But, by all the authorities, the plaintiff's tender age and consequent lack of experience tended to show such want, and made it a question for the jury; and in determining it, the jury had a right to consider the appearance of the plaintiff in court and on the stand. *Disotell v. The Henry Luther Co.*, 90 Wis. 635, a case of this kind in which the plaintiff was eighteen years old. Hence, defendant's motion for a verdict was properly overruled.

The plaintiff's mother was allowed to testify that he had "grown a good deal" since the accident, which was a year and a half before. It is objected that this was error, because no

question was made by either party but that the plaintiff was physically able to perform the work; because the testimony could not enlighten the jury, and would lead them to speculate on the plaintiff's size; because it was susceptible of different conclusions by different persons; and because the fact that he was small, did not bear on his capacity to understand and comprehend the danger. But, as the plaintiff's tender age and consequent lack of experience tended to show his physical inability, he thereby questioned that he had such ability; and the fact that he was small, as the last objection phrases it, bore upon that question.

As to the testimony not enlightening the jury and leading them to conjecture, it is true that evidence should afford a basis for belief and not merely for conjecture; but this testimony afforded a basis for belief that the plaintiff was smaller at the time of the accident than at the time of the trial, though it did not show with any certainty how much smaller; and it was not necessary that it should in order to be admissible; it was admissible for what it was worth. That different conclusions could be drawn from it by different persons goes only to its probative quality. The question of its admissibility lies back of that.

There was no evidence that the defendant knew the exact age of the plaintiff at the time of his employment; but he had known him since he was a small boy, and had seen him around a good deal since he was old enough to be around with other boys.

In his opening argument to the jury, the plaintiff's counsel said he claimed that the defendant was negligent in putting the boy to work where he did, and that the defendant had notice of his incapacity when he hired him. The defendant's counsel objected that there was no evidence to support the claim. But the plaintiff's counsel continued to argue that the defendant had such notice, and that the boy himself was that notice, and that he claimed no other. The defendant's counsel kept objecting, and was allowed an exception. The court then elicited from the plaintiff's counsel that as there was no dispute about the boy's age, and he had been around there enough so that the defendant must have known substantially what his age was, he argued that an inference could be drawn as to the capacity of the boy, and that the age and size of the boy were notice

to the defendant that he was not of mature years, and not, as measured by boys in general, of sufficient capacity. The court then said: "Your argument is, that the apparent age and size of the boy as the defendant knew him, was notice to the defendant that he had not the capacity of a mature man?" Counsel said that was his argument, and that that was the only thing he claimed. The court thereupon said to the jury that they were instructed, and that the court held, that plaintiff's counsel might argue that the apparent age and size of the boy were notice to the defendant that he had not the capacity of a mature person, and that anything further than that they were not to regard. Thereupon plaintiff's counsel said: "I withdraw anything I have said inconsistent with the statement of the court; that is all I claim." This action on the part of the court, taken in such good time, and the complete withdrawal and disclaimer of counsel, were, we think, effective to blot out from the minds of the jury any wrong impression they might have got from the argument, unless we say that the court erred in allowing counsel to argue as it finally did. But this cannot be said, for it is undoubted law that the age and size of the boy were notice to the defendant that he had not the capacity of a mature person for the work in question.

There was no evidence that the plaintiff suffered pain, except what the injury itself afforded. In his closing argument, plaintiff's counsel, for the first time, claimed damage for pain and suffering. To this the defendant objected that there was no evidence of pain and suffering, and that the claim should have been made in the opening. But the court held that there was evidence warranting the claim, and allowed the argument to proceed, telling the defendant that he might reply. But he did not reply, nor ask leave to meet the claim in any other way. He now insists that this was error, for that the injury itself was no evidence of pain, but that there should have been some word of testimony to show it; and *Curtis v. Rochester etc. R. R. Co.* 18 N. Y. 534, is relied upon as in point. But it is not in point. This question was not involved in it. We think the ruling well within the doctrine of judicial notice, which is based upon the maxim that what is known need not be proved, and it would seem that nothing can be better and more commonly known than that a bodily injury of this character and severity causes

pain. But it is argued that however it might have been formerly, yet now, under the modern treatment of such cases, it is well known that the patient cannot recall a moment of pain or suffering in a large number of cases; that aseptic surgery, the use of anesthetics, and the great strides of modern science in the treatment of such injuries, have practically eliminated bodily pain and suffering, so that it would be practically impossible to draw a correct inference that pain and suffering ensued merely from the fact of injury; and certainly that it would be impossible, in these days, to say how much or how long the injured person suffered, if at all. But however this may be, there is nothing in the case to show that the plaintiff received any such treatment. All that appears is, that he "was taken to a surgeon, who dressed the wound."

The defendant further says that if there had been any testimony offered to show that the plaintiff suffered pain, he could have successfully contradicted it; but that no such opportunity was given him, and that he was thereby deprived of a right, for which there should be a reversal. But it was discretionary with the court to allow the claim to be made in the close though not made in the opening, and no right of the defendant's was thereby infringed, for he had no right at that stage of the case to meet the claim with testimony. He could do that only by leave, and that he did not ask for.

Judgment affirmed.

ROBERT A. LAWRENCE, STATE'S ATTORNEY v. RUTLAND RAILROAD COMPANY.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed November 16, 1907.

Corporations—Corporate Existence and Franchise—Legislative Control—Amendment of Charter—Foreign Corporations—Constitutional Law—Weekly Payment Act—Due Process of Law—Equal Protection of Laws—Class Legislation—When Valid—Liberty to Contract—Bill of Rights—Statutes—Void in Part—Effect.

A corporation is a "person," within the meaning of the due process clause, and of the equality clause, of the Fourteenth Amendment of the Federal Constitution.

A corporate charter is a contract between the State and the corporators, and, like any other contract, is protected by the Federal Constitution from state legislation impairing its obligation.

Nevertheless, a reservation in a corporate charter, or in the general law antedating such charter, of a power to amend, alter, or repeal as the public good may require, subjects to legislative control all corporate rights, privileges, and immunities derived from the State, including the very existence of the corporation; but rights and interests acquired by the corporation, not constituting a part of the contract of incorporation, and so not derived directly from the State, stand on a different footing, and are not thereby subjected to legislative control.

Although class legislation, discriminating against some and favoring others, is prohibited by the equality clause of the Fourteenth Amendment of the Federal Constitution, yet special legislation does not contravene that clause, if, within the sphere of its operation, all persons within its provisions are treated alike in like circumstances and conditions.

The State may distinguish, select, and classify objects of legislation; nor is classification for such purpose invalid because not based

on scientific or marked differences in things or persons or in their relations. It is enough if it is practicable, and it is not reviewable unless palpably arbitrary.

No. 117, Acts 1906, requiring any mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad, or other transportation company, and any water, electric light, or power company doing business in this State, to pay its employees each week in lawful money, is not, as to either requirement, a deprivation of liberty or property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution, as to a railroad corporation whose charter, and the general law antedating it, provides that the charter shall be subject to amendment, alteration, or repeal as the public good may require; nor is it as to the stockholders of such corporation.

No. 117, Acts 1906, requiring railroad and certain other corporations doing business in this State to pay their employees each week in lawful money, is not, as to a railroad corporation, a denial of the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution, though it does not apply to all corporations.

Even if No. 117, Acts 1906, requiring railroad and certain other corporations doing business in this State, to pay their employees each week in lawful money, includes corporations that it should not, which is not intimated, it would not thereby be invalidated as to a railroad corporation in respect of which it is otherwise valid.

No. 117, Acts 1906, requiring railroad and certain other corporations doing business in this State to pay their employees each week, in lawful money, is not subject to the objection that the Act cannot operate alike on all within its provisions because it includes foreign corporations, whose charters the Legislature is without power to amend, since foreign corporations are as amenable to the laws of this State as to business done therein, as are domestic corporations.

No. 117, Acts 1906, is not invalid as restricting the rights of railroad employees to contract with their employer, since such restriction is not direct, but results from the restriction of the employer's rights, and as that restriction is valid as to the employer, the rights of the employees are not thereby infringed.

No. 117, Acts 1906, requiring railroad and certain other corporations doing business in this State to pay their employees each week in lawful money, is not, as to a railroad corporation whose charter,

and the general law antedating it, provides that the charter shall be subject to amendment, alteration, or repeal as the public good may require, in contravention of the declaration of the Bill of Rights that all men are born equally free, and have certain natural rights, amongst which are acquiring, possessing, and protecting property, nor of the declaration that every member of society "hath a right to be protected in the enjoyment of life, liberty, and property."

ACTION on No. 117, Acts 1906, the Weekly Payment Act, to recover the penalty for one failure to pay as therein required. Heard on an agreed statement of facts, August 20, 1907, in the City Court of the City of Rutland, *Farnsworth*, Judge. Judgment for the plaintiff to recover the penalty of fifty dollars and costs. The defendant excepted.

H. Henry Powers for the defendant.

No. 117, Acts 1906, is in violation of those sections of our Bill of Rights providing:

"That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property and pursuing and obtaining happiness and safety, and that every member of society hath a right to be protected in the enjoyment of life, liberty and property."

The word "liberty" as used in the above quoted section includes the right to contract and thereby to acquire property. *Braceville Coal Co. v. People*, 147 Ill. 66; *Frorer v. People*, 141 Ill. 171; *Cooley's Constitutional Law* 393; *Com. v. Perry*, 155 Mass. 117; *Godcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va. 179; *Leep v. R. R. Co.*, 58 Ark. 407.

If therefore the Legislature shall say in affirmative terms that no corporation should have the power to make a contract, the stockholders are deprived of a right higher and more sacred than a legislative fiat. If one thousand men associate themselves and jointly make a contract, which the Constitution protects, why may not the same men as stockholders in a corporation make a like contract with like protection? As stockholders

they make the contract through their authorized agents, the corporate officers. *Railroad Tax Cases*, 13 Fed. 744, 747.

The act in question is in violation of the due process clause and of the equality clause of the Fourteenth Amendment of the Federal Constitution.

A corporation is a "person" within the meaning of that amendment. *Santa Clara Co. v. So. Pac. R. R. Co.*, 118 U. S. 394; *Charlotte R. R. Co. v. Gibbs*, 142 U. S. 386; *Minneapolis etc. R. R. Co. v. Beckwith*, 129 U. S. 26.

The words "Equal protection of the law" have been held to mean the protection of equal laws, that is equal in respect to burdens imposed, equal in respect to privileges enjoyed and equal in respect to the protection of natural rights which antedate all statutory enactments. A corporation in Montpelier engaged in manufacturing granite headstones employing 500 men, must pay its men their wages weekly. An individual in Montpelier engaged in manufacturing granite headstones, employing 500 men, may pay his men as he and they may agree. Both are "persons" within the Fourteenth Amendment. Does not the weekly payment law deny to the corporation the protection of the laws that its competitor enjoys? A corporation, therefore, being a "person" has the same rights as a natural person. If a natural person has, as a birth-right, the natural and unalienable right to enjoy liberty and acquire property, and as included in such, the right to make contracts, the corporate person, within the scope of its charter, must have by force of this Amendment the same right. The State of Vermont, in the passage of the weekly payment law, denied to the artificial person the rights it accords to the natural person, in violation of the Fourteenth Amendment, and in violation of Article I of our State Constitution.

The right of a corporation to make contracts for paying the wages of its employees is both a liberty and a property. To what due process of law has the State resorted to save it from the prohibitions of this language? The only "process of law" suggested is 1st: this legislation is an amendment to the charter. What is meant by the clause usually inserted in charters reserving the right to alter or amend this Act as the public good may require? "This Act," as applied to the Rutland road, is a grant of the franchise to be a corporation, and as such

to build and operate a railroad. Any permissible amendment, therefore, must alter or change one or the other of these franchises, otherwise it travels outside the reserved power. If the amendment merely undertakes to regulate a method of current business it is invalid. It may properly regulate the operation of the road but fixing a payday for work is no part of the operation of the road. It may regulate the speed of the trains but may not regulate the speed of paydays. But the regulation of the speed of trains is not accomplished by force of an amendment to the charter but by the exercise of the *police power*, to insure public safety. Fixing a payday for wages is not an exercise of the police power because the public have no interest in the question. It concerns the wage earner and his master only. No amendment can be made to a charter unless it directly changes the power granted. *Sinking Fund Cases*, 99 U. S. 741; *Com. v. Essex Co.*, 13 Gray 239; *Railroad Tax Cases*, *supra*.

Nor is the legislation justified as an exertion of the police power. That power can only be exercised when the health, morals, or welfare of the public is at stake. It is never exercised to promote the health, morals or welfare of the individual. It is warranted by the maxim *Salus populi suprema lex*. No question of public health, public morals, or public welfare is at stake, when I agree with my hired man to pay his wages once a month. The scope of the "police power" has frequently been before the courts for consideration and its limits and application to a concrete case has been clearly defined. In all cases analogous to the case in hand its existence has been denied. *Cooley Const. Limitations*, 572; *Slaughter House Cases*, 16 Wall. 36; *Re Jacobs*, 98 N. Y. 98; *Lockner v. New York*, 198 U. S. 45; *Tiedman Police Power*, Par. 178; *Freund Police Power*, 534.

The statutes making eight hours a day's work are in principle like the act here in question and have been uniformly held unconstitutional. *Low v. Reese Printing Co.* 43 Am. St. Rep. 670; *Ritchie v. People*, 46 Am. St. Rep. 315; *State v. Loomis*, 115 Mo. 307; *Millett v. People*, 117 Ill. 204; *Republic Iron and Steel Co. v. State*, 62 L. R. A. 136.

Clark C. Fitts, Attorney General, and Robert A. Lawrence, State's Attorney, for the plaintiff.

The act in question operates prospectively only, and so does not impair the obligation of contracts made prior to its enactment to be performed after it went into effect. *Bennington v. Park et al.* 50 Vt. 178; *Briggs v. Hubbard*, 19 Vt. 86; *Lowry v. Keyes*, 14 Vt. 74; *Wires v. Farr*, 25 Vt. 41; *Sturgis v. Hull*, 48 Vt. 302; *Barton National Bank v. Atkins*, 72 Vt. 33.

The obligation imposed on the state in defendant's charter contract is not impaired, nor has defendant been denied the equal protection of law, nor has it been deprived of property without due process of law, for the right to amend, alter or repeal defendant's charter is conferred on the Legislature by the charter and by the general law of the State in force at the time of its enactment. *Re Consolidated Rendering Co.* 79 Vt. 55; *Thorpe v. R. R.* 27 Vt. 140; *Cook v. Howland & Bacon*, 74 Vt. 396; *Clarendon v. R. R. Co.* 75 Vt. 6; *Rhode Island v. Mfg. Co.*, 17 L. R. A. 856.

There is a distinction between natural persons and corporations; the former do not derive the right to contract from the Legislature, while the latter possesses only the powers in that regard conferred by their charters. And where the Legislature has reserved the right to amend a charter, it may as it chooses, limit the right of the corporation to contract, and the corporation will not be heard to complain that it is thereby denied equal protection of the laws or that it is deprived of its property without due process of law. *St. Louis etc. R. R. Co. v. Paul*, 37 L. R. A. 504, 173 U. S. 404; *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205; *State v. Brown & Sharpe Mfg. Co.* 17 L. R. A. 856.

The fact that corporations, other than railroad corporations, are subject to the statute is immaterial. It is sufficient if the Legislature has included all corporations in the same business as the defendant. The statute might be held unconstitutional as to the other corporations, and it would not affect its validity as to railroad corporations, for the statute is clearly severable in this respect. *State v. Scampini*, 77 Vt. 92; *State v. Paige*, 78 Vt. 286; *State v. Kibling*, 63 Vt. 636; *Minnesota Iron Co. v. Kline*, 199 U. S. 593; *Tullis v. Lake Erie and Western R. R.* 175 U. S. 348.

The act in question is constitutional because it is but the exercise of the police power reserved to the states. *Tarbell v.*

R. R. Co. 73 Vt. 347; *Text Book Co. v. Weisinger*, 160 Ind. 349; *Re House Bill No. 1230*, 28 L. R. A. 344 (Mass.); *State v. Shedroi*, 75 Vt. 277; *State v. Hoyt*, 71 Vt. 59.

In *Holden v. Hardy*, 169 U. S. 366, the Federal Supreme Court upheld the constitutionality of an act of the State of Utah regulating the employment of working men in underground mines and fixing the period of employment at eight hours per day. *Gunling v. Chicago*, 177 U. S. 188; *Crowley v. Christinsen*, 137 U. S. 86; *Farmer Ins. Co. v. Dobney*, 189 U. S. 301; *Achison, Topeka etc. v. Matthews*, 174 U. S. 96; *Skinner v. Garnett etc. Co.*, 96 Fed. 735; *State v. Hoyt*, 71 Vt. 59; *Lieberman v. Van de Carr*, 199 U. S. 552; *Mo. etc. Ry. Co. v. May*, 194 U. S. 267. In *Knoxville Iron Company v. Harbison*, 183 U. S. 13, the United States Supreme Court sustained the constitutionality of the statute, which, as stated by the Supreme Court of the State, abridged or qualified the "right of contract in that it requires that certain obligations payable in the first instance in merchandise shall in certain contingencies be paid in money."

ROWELL, C. J. The question is whether the weekly payment act of December 10, 1906, is constitutional. It provides that a mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad or other transportation corporation, and an incorporated express, water, electric light or power company, doing and transacting business in this State, shall pay each week, in lawful money, each employee engaged in the business, the wages earned by such employee to a day not more than six days prior to the date of such payment; provided, that if at any time of payment an employee is absent from his regular place of labor, he shall be entitled to such payment on demand.

It further provides that no such corporation shall pay its employees in script, vouchers, due-bills, nor store orders, except it be a co-operative corporation in which the employee is a stockholder, but shall on request of such shareholding employee, pay him as provided in the act.

It further provides that no assignment of future wages payable thereunder shall be valid, if made to the corporation from which such wages are to become due, or to anyone in its behalf, or if made or procured to be made to any one for the pur-

pose of relieving such corporation from the obligation to pay according to the act; and that no corporation shall require an agreement from an employee to accept wages at any other period as a condition of employment.

The act penalizes each failure to pay as therein required, and this action is brought to recover a penalty for one such failure. As the case is presented, the defendant does not question its liability if bound by the act.

The defendant's charter, granted in 1867, provides that it "shall be subject to the action of any future Legislature to amend, alter, or repeal as the public good may require." Before and at the time of this grant, the general law was, ever since has been, and still is, to the same effect as to all acts creating, continuing, altering, or renewing a corporation or body politic.

The plaintiff claims that as to changing the defendant's charter, the act in question does not go beyond the scope of the power therein reserved for that purpose; nor beyond the general law in that behalf, which, being in force when the charter was granted and still in force, must be read into it as a part of it; and besides, that the act is a proper exercise of the police power of the State. The defendant denies this, and contends that the act contravenes both the Federal Constitution and the State Constitution; the Federal Constitution, because it deprives the defendant of liberty and property without due process of law, and denies to it the equal protection of the laws; the State Constitution, because it contravenes the declaration of the Bill of Rights that "all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending of life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety"; and also because it contravenes the further declaration of the Bill of Rights that "every member of society hath a right to be protected in the enjoyment of life, liberty, and property."

The questions arising under the Federal Constitution will be first considered, for their determination will largely dispose of those arising under the State Constitution. It is needless to say that on the Federal questions, the decisions of the Federal Supreme Court are controlling, so we shall not go much

outside of them. And it may be said *in limine* that they settle that a corporation is a person, within the meaning of the due-process clause and the equality clause of the Fourteenth Amendment; and that a corporate charter is a contract between the State and the corporators, and protected by the Federal Constitution, like any other contract, from legislation impairing its obligation.

To show that the act in question is within the power to amend reserved in the defendant's charter and in the general law, the plaintiff relies largely on *St. Louis, Iron Mountain & Southern Railway Co. v. Paul*, 173 U. S. 404, which was error to the Supreme Court of Arkansas, and involved the constitutionality of a statute of that State providing that when any railroad company, or any company, corporation, or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or sub-contractor engaged in the construction of any such road or bridge, discharged, with or without cause, or refused further to employ, any servant or employee, the unpaid wages of such servant or employee then earned at the contract rate, without abatement or deduction, should be and become due and payable on the day of such discharge or refusal, and if not paid on such day, then, as a penalty for non-payment, the wages should continue at the same rate until paid, but not more than sixty days, unless an action was brought therefor within that time. The action was to recover both wages and penalty.

The Constitution of that State provided that corporations might be formed under general laws, which might be altered or repealed from time to time; that the general assembly should have power to alter, revoke, or annul any charter of incorporation then existing and revocable, or any that might thereafter be created, whenever, in its opinion, it might be injurious to the citizens of the State; in such manner, however, that no injustice should be done to the corporators.

The Federal Supreme Court affirmed the judgment below, which sustained the statute as within this reserved power of amendment, as far as it affected corporations, and as not violative of the Fourteenth Amendment nor of the Constitution of the State, which is substantially like the declarations of our Bill of Rights relied upon—following the case of *Leep* against

the same defendant, 58 Ark. 407, in which the statute was held unconstitutional as to subjects of contract purely and exclusively private, unaffected by any public interest or duty to person, society, or government, and the parties are capable of contracting; as to which, it was said, no condition can exist warranting legislative interference for the purpose of prohibiting the contract or controlling its terms.

It was contended above in the *Paul Case*, that as to railroad corporations organized before its passage, the act was void because it violated the Fourteenth Amendment. But the Court said that corporations are creatures of the State, endowed with such faculties as the state bestows, and subject to such conditions as the state imposes, and if the power to modify their charters is reserved, the reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and that as the amendment then in question rested on reasons deduced from the peculiar character of the business of the corporations affected, and the nature of their functions, and applied to all alike, the equal protection of the laws was not denied.

The further question was, whether the amendment should have been held unauthorized because amounting to a deprivation of property forbidden by the Federal Constitution. The Court said that the power to amend could not be used to take away property already acquired under the operation of the charter, nor to deprive a corporation of the fruits of contracts lawfully made that had been reduced to possession; but that alterations or amendments could be made that would not defeat, nor substantially impair, the object of the grant nor any rights that had vested under it, and which the Legislature might deem necessary to secure that object, or other public or private rights; that the act in question was purely prospective, and did not interfere with vested rights, existing contracts, nor destroy, nor sensibly encroach upon, the right to contract, although it did not impose a duty in relation to the payment of wages actually earned that restricted future contracts in the particular named. In view of the fact that the corporations embraced in the act were clothed with a public trust, and discharged duties of public consequence, affecting the community at large, the Court below held the regulation promotive of the public interest in the

protection of employees to the limited extent stated, and properly within the reserved power to amend. The Court above said that inasmuch as the right to contract was not absolute, but might be subjected to the restraints demanded by the safety and welfare of the state, it did not think that the conclusion below in its application to the power to amend could be disputed on the ground of infraction of the Fourteenth Amendment. But it is said that the case is not authority, because, when the defendant in error was discharged, his wages earned became due and payable at once at the common law, and that the action was maintainable on that ground alone. But however that was as to the wages, it was scarcely so as to the penalty, for that would not accrue at common law, and recovery was had for both. And besides, no such question was suggested in the case, which was put exclusively on the constitutionality of the act, and so it must be regarded as authority on that question. And the Court recognized it as such in the memorandum case of *Minneapolis etc. R. R. Co. v. Gano*, 190 U. S. 557, which was affirmed on the strength of it and of other cases. And it is in accord with the decisions of that Court generally on the question of how far a reservation in a charter or in a general law, of power to amend, alter, or repeal as the public good may require, authorizes legislative control of the corporation. The rule deducible from those decisions, shortly stated is substantially this, we think: that such a reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state, including its very existence; but that rights and interests acquired by the corporation, not constituting a part of the contract of incorporation, and so not derived directly from the state, stand on a different footing, and are not thereby subjected to legislative contract.

Thus, in *Tomlinson v. Jessup*, 15 Wall. 454, exemption from taxation granted in an amendment of a charter, not made on a consideration moving to the state, was held revocable under a power contained in a general law antedating the charter. The Court said that it was true that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character; and that it might be equally true,

as claimed, that the exemption from taxation added largely to the value of the stock of the corporation, and induced the defendant in error to purchase the shares held by him; but that those considerations could not be allowed any weight in determining the validity of the subsequent taxation; that the reserved power authorized any change in the contract of incorporation as it originally existed, or as subsequently modified, or its entire revocation; that the original corporators and the subsequent stockholders took their interests with notice of the power, and of the possibility of its exercise at any time in the discretion of the Legislature; that the object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form that will preclude legislative interference with their exercise if the public interest should at any time require such interference; that it is a provision intended to reserve to the state, control over its contract with the corporators, which, without that provision, would be irrevocable, and protected from any measures affecting its obligation; that the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State; but that rights acquired by third persons, which have become vested under the charter in the legitimate exercise of its powers, stand different. There, the State contended only for power under the reservation to modify its own contract with the corporators, not for power to revoke contracts of the corporation with other parties, nor to impair any vested rights thereby acquired. *Railroad Co. v. Maine*, 96 U. S. 499, is to the same effect.

But the alterations must be reasonable, made in good faith, and consistent with the scope and object of the act of incorporation, for beyond the sphere of the reserved power, the vested rights of corporators are surrounded by the same securities, and are as inviolable, as are such rights in other cases. *Shields v. Ohio*, 95 U. S. 319, 324.

The doctrine of these cases is approved and applied in the *Sinking Fund Cases*, 99 U. S. 70. There it was held that by virtue of a reserved power to amend, Congress could require the plaintiffs, which were railroad corporations, to set aside a portion of their current income as a sinking fund, to meet

certain of their mortgage debts when they matured. As to the Union Pacific Company, which was a government corporation, the court said it was safe to say that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to prescribe by amendment; that it could not undo what had been done, nor unmake contracts that had been made, but that it could provide for what should be done in the future, and direct what preparations should be made for the due performance of contracts already entered into; that it could originally have prohibited the borrowing of money on mortgage, or said that no bonded debt should be contracted without ample provision by sinking fund to meet it at maturity; that not having done so at first, it could not then, by direct legislation, vacate mortgages already made under the power originally granted, nor release debts already contracted, but that a prohibition against contracting debts in the future, would not avoid debts already contracted. The Central Pacific Company, which was a state corporation, was held to be within the act of Congress for special reasons. We are referred to some of the dissenting opinions in those cases. But they are not authoritative. They recognize the rule, however, and deny only its application.

Thus it is shown how far a reserved power to amend, alter, or repeal a charter as the public good requires, authorizes legislative control of the corporation; and by that rule, the act in question must be tested, for that is the power reserved in the defendant's charter, and in the general law. It is true that requiring the defendant to pay weekly, restricts its right to contract with its employees for a longer period of payment; and this, the defendant says, cannot be done, for it was chartered to build and operate a railroad, and although nothing is said in the charter about the right to contract, yet that right exists, for without it a railroad could neither be built nor operated; that the grant carried with it all incidental powers necessary to make it effective for the purpose for which it was made; that as long as the road is operated, so long the right to contract must continue; that the right to make contracts for the payment of wages is a part of the franchise granted, and is a vested right, protected by the Fourteenth Amendment, and

therefore cannot be disturbed by the Legislature by amendment of its charter, by the exercise of the police power, nor otherwise howsoever. But that argument is untenable because it fails to note the reserved power to amend, which is a part of the charter contract, and no change within the scope of that power, which is limited to the requirements of the public good, can be said to impair the obligation of that contract, for the corporators must be taken to have assented in advance to all such changes. And that the act is within the scope of that power cannot be doubted, for its requirement, especially as far as it relates to the defendant and to the class to which it belongs, which are clothed with a public trust, and discharge duties of public concern, affecting the community at large,—is promotive of the public good in protecting their employees to the limited extent it does.

Nor does that requirement destroy, nor sensibly encroach upon, the right to contract, but only modifies that right, which is not absolute, but is subject, on general principles, to such reasonable restraint as the public good may require. It is the *general* right to acquire and possess property, and, by necessary implication, the *general* right to contract concerning it, that the Constitution protects. But that protection does not make those rights absolute in every particular. If it does, what becomes of the police power, which inheres in every free government, and is based on the maxim, *sic utere tuo ut alienum non laedas*, which, as the Federal Supreme Court says, is of universal and pervading obligation, and a condition on which all property is held; that its application to particular conditions must necessarily be within the reasonable discretion of the legislative power; and that when such discretion is exercised in a given case by means appropriate and reasonable, not oppressive nor discriminatory, it is not subject to constitutional objection. *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 566. This doctrine is equally applicable here, for the reserved power with which we are dealing, like the police power, is, as we have said, limited by the requirements of the public good.

The case at bar is not distinguishable from the *Paul Case*, for there as here, the corporation was clothed with a public trust, and discharged duties of public consequence, affecting the community at large, and the time of payment was fixed by

statute, regardless of the contract. Nor is it distinguishable from the *Sinking-Fund Cases*, for there the corporations were virtually made to pay their debts before they became due. And it is well within *Tomlinson v. Jessup*, for there an exemption from taxation contained in a charter, not made on a consideration moving to the state, was held revocable, when deemed by the legislature to be for the public good.

Therefore the act does not deprive the defendant of liberty nor property in contravention of the Fourteenth Amendment because it requires weekly payments. Nor does it because it requires payment in lawful money, for the medium of payment is as much within the scope of the reserved power as the time of payment. Indeed it is held that in some cases the medium of payment is within the police power. Thus, in *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, a statute of Tennessee was upheld on that ground, which required, in certain circumstance, the redemption in lawful money of coupons, script, store orders, and other evidences of indebtedness, issued by employers in payment of wages due to employees. It was there objected that no power to amend was reserved in the plaintiff's charter. But the Court said that although in the *Paul Case* stress was laid on the reserved power to amend; yet, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power may, within defined limits, extend over corporations outside, and regardless, of the power to amend charters. In that case the employees were considered to be at a disadvantage with the employers in the matter of wages, they being miners and coal workers. The case is referred to approvingly in *Lochner v. New York*, 198 U. S. 45, 55.

Nor does the act deny to the defendant the equal protection of the laws. True, it does not include all corporations doing business in the State; but it includes all of the particular class to which the defendant belongs, namely, all railroad corporations, and all other transportation corporations, and all telegraph, and all telephone, corporations, and all incorporated express companies, and perhaps some other public-service corporations. But it is not necessary to its validity that it should include all corporations doing business in the State; for

although class legislation, discriminating against some and favoring others, is prohibited, yet special legislation does not contravene the equality clause of the Fourteenth Amendment, if, within the sphere of its operation, all persons within its provisions are treated alike in like circumstances and conditions. *Hayes v. Missouri*, 120 U. S. 68, 72; *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205. It is said in *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283, 294, that the state may distinguish, select, and classify objects of legislation, and that the power must necessarily have a wide range of discretion. And this is because of the function of legislation, and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It is enough if it is practical, and it is not reviewable unless palpably arbitrary. *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 562. It was there held that a fire insurance company was not deprived of the equal protection of the laws by a statute applicable to fire insurance companies only, making the entire amount of the policy payable in case of loss, reduced by depreciation of the property after it was insured. In *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U. S. 26, a statute of Iowa making a class of railroad corporations for special legislation was sustained. There the statute imposed double damages for stock killed or injured at a point on the road where the corporation had a right to build a fence but had not. In *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205, a statute of Kansas was sustained that abrogated the fellow-servant doctrine only as to railroad companies organized or doing business in the State.

While these cases may not be precedents for the case in hand, they are analogous examples of the application of the rule of classification, which is, that you must differentiate before you can classify, for otherwise you have only arbitrary selection, which is no ground for classification.

But the *Paul Case* is a precedent here, for there the valid part of the statute applied to railroad corporations only, and they alone were classified for the purpose of making them pay in certain circumstances, regardless of contract. Here the

classification is made for substantially the same purpose, and is broader than the classification there, for it includes more than railroad corporations; and even if it includes more than it should, which we do not intimate, the bad would not vitiate the good, as it did not in the *Paul Case*.

In this connection we are referred to the *Railroad Tax Cases*, 13 Fed. 722. There the taxes sought to be collected were held invalid because of the discriminatory character of their assessment, which the court said was palpably and grossly unjust, and entirely disregarded the rule of equality and uniformity. The judgment was affirmed above on another ground, and the question on which the case turned below was not considered; 118 U. S. 394. But extreme cases do not prove the rule, and the case as put below is too extreme to be of aid here.

But it is objected that the act cannot operate alike on all within its provisions, for it includes foreign corporations doing business in this State, and as the Legislature cannot amend their charters, they are not subject to its control in this behalf.

True, the Legislature cannot amend the charters of foreign corporations. But this Court has recently held that foreign corporations doing business here are as amenable to our laws as to business done here as are domestic corporations. *In re Consolidated Rendering Co.* 80 Vt. 55, 78, 66 Atl. 790. See also, *Cook v. Howland and Bacon*, 74 Vt. 393, 52 Atl. 973. This precise question was ruled in *Dayton Iron Co. v. Barton*, 183 U. S. 23. There the plaintiff in error undertook to defend on the ground of being a foreign corporation. The case arose under the Tennessee store-order act that had just been held valid as to domestic corporations in *Knoxville Iron Co. v. Harrison*, 183 U. S. 13, above referred to. But the Court said that as the act was valid as to domestic corporations, it was valid as to foreign corporations, whose right to do business in the State might be deemed subject to the condition of obeying the regulations prescribed in the legislation of the State.

It is also objected that the act is invalid because it restricts the rights of the defendant's employees to contract with it. But the restriction of their rights is not direct, but results from the restriction of the defendant's rights; and as that restriction is good as to the defendant, the rights of its employees are not thereby infringed, for they have no right to

demand greater liberty for the defendant in order that their liberty may be enlarged. *State v. Brown etc. Mfg Co.*, 18 R. I. 16, 17 L. R. A. 856, 864.

It is also objected that the act infringes the rights of the defendant's stockholders. We quite agree with what Mr. Justice Field said below in the *Railroad Tax Cases*, that when it is necessary for the protection of contract or property rights, the courts will look through the artificial name and entity of the corporation to the persons who compose it, and protect them, though the process be in its name; and with what Judge Sawyer said in the same cases, that for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators. But their property rights are no more absolute than are the property rights of others, but are as subject to modification as theirs. All men can modify their property rights by contract, but no man can bargain away his right to contract at all concerning property, for that right is unalienable.

Now the defendant's stockholders did modify their property rights in the corporation by becoming stockholders therein, for thereby they must be taken to have assented to any and all amendments of the charter that come within the reserved power; and as the act in question comes within that power, and amends the charter as far as it is inconsistent with it, and to that extent modifies property rights under it, they must be taken to have assented to that modification also. *Tomlinson v. Jessup*, 15 Wall. 454.

But the defendant says that in many of the States, acts on this and kindred subjects have been passed, and have always been held unconstitutional as depriving both the employer and the employed of the right to contract; and refers to divers police power cases in support of the claim. Although we do not put this case on the ground of the police power; yet, as that power and the power here reserved are alike limited to the requirements of the public good, those cases may properly be considered, as they are illustrations of the application of the principle involved. On the subject of eight-hour laws, reference is made to *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, and to *Ritchie v. The People*, 155 Ill. 98, 46 Am. St. Rep. 315. The Nebraska statute was, that a day's

work for all classes of mechanics, servants, and laborers, except those engaged in farm and domestic labor, should not exceed eight hours. The Illinois statute was, that no female should be employed in a factory more than eight hours in any one day, nor more than forty-eight hours in any one week. It was held in both of those cases that the statutes did not come within the police power, and were unconstitutional as depriving both the employer and the employee of the right to contract. But those cases are no warrant for saying that in no circumstances can the hours for a day's work be limited; for in *Holden v. Hardy*, 169 U. S. 366, a statute limiting the employment of workmen in all underground mines and workings, and in smelting and other plants for reducing or refining ores or metals, to eight hours a day, except in certain emergencies, was held a valid exercise of the police power, because the kind of employment and the character of the employed in that kind of labor was such as to make it reasonable and proper for the State to interfere in order to protect them from being constrained by the rules of the proprietors in regard to labor. That case is referred to approvingly in *Lockner v. New York*, 198 U. S. 45, 54, in which a statute limiting hours of work in bakeries was held not to come within the police power, as there was no reasonable ground for the classification.

Reference is made to cases holding that store orders and the like cannot, by statute, be made payable in money; and to cases holding that the relations between employer and employee in the business of manufacturing and mining cannot be regulated by statute. But most of those cases refer to matters held to be purely of private concern, and not at all of public concern. Thus, in *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, the question arose under an act "to secure to operatives and laborers engaged in and about mines, manufactories of iron and steel, and all other manufactories, the payment of their wages at regular intervals, and in lawful money of the United States." The Court stated the question to be, whether the Legislature could limit or forbid the right of contract between persons under no mental, corporal, or other disability, when the subject of the contract is lawful, not public in its character, and the exercise of it is purely private and personal to the parties themselves.

So in *Millett v. The People*, 117 Ill. 294, 57 Am. Rep. 869, a statute providing for weighing coal at mines as a basis for computing wages for mining it, and declaring null and void all contracts for mining it in which the weighing provided for by the statute was dispensed with, was held unconstitutional, because not a matter of public concern. The Court said that the public is not compelled to resort to mine owners any more than it is to resort to the owners of any other of the ordinary necessities or conveniences of life that form a part of the commerce of the country. And that the owner of a coal mine is under no obligation to obtain a license from any public authority, and therefore exercises no franchise when he works his mine. In *Frorer v. The People*, 141 Ill. 171, a law singling out persons, corporations, and associations engaged in mining and manufacturing, and depriving them of the right to contract as persons, corporations, and associations engaged in other business might lawfully do, was held unconstitutional. So in *Ramsey v. The People*, 142 Ill. 380, an act for the weighing in gross of coal hoisted from mines, was held unconstitutional for the same reason. *State v. Loomis*, 115 Mo. 307, much relied upon by the defendant, was a store-order case against the members of a firm of coal miners. The law was held unconstitutional, but the Court expressly said that the defendants in operating their coal mines were not pursuing a public business, and had not in any way devoted their property to a public use, and that therefore the cases of *Munn v. Illinois*, 94 U. S. 113, and *Budd v. New York*, 143 U. S. 517, were not in conflict with its decision. Those were warehouse cases, in which it is held that when a person engages in the warehouse business, he subjects himself to legislative control concerning it, as he thereby devotes his property to a public use.

The defendant refers to *Braceville Coal Co. v. The People*, 147 Ill. 66, 37 Am. St. Rep. 206, in which a special act "to provide for the weekly payment of wages by corporations," but which did not include all corporations in the State, nor properly discriminate between those that it did include and those that it did not, was held void for that reason, but more especially because, although the general corporation act provided that the Legislature should, at all times, have power to prescribe such regulations and provisions as it might deem

advisable, which should be binding on all corporations formed thereunder, yet as the Constitution of the State required, by manifest intendment, not only that corporations should be created, but that amendments to charters of those existing should be by general laws, applicable alike to all in like circumstances and existing under the same conditions, it necessarily followed that special acts, applying to particular corporations only, and not to the general body of corporations created under the general act, would fall within the prohibition of the Constitution.

In *Republican Iron and Steel Co. v. The State*, 160 Ind. 379, 62 L. R. A. 136, a weekly payment law was held unconstitutional as not within the police power. But the case was treated as not involving a matter of public interest. The Court stated the question to be, whether "the arbitrary denial of the right to exchange money for labor—one class of property for another—in matters which affect no public interest, is an unwarrantable interference with the right of contract, and a depriving of the individual of liberty and property without due process of law. *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, is in point for the defendant, for the case was not put on the ground that it involved no matter of public interest, whereas, as we have seen, most of the cases referred to by the defendant are put on that ground, which impairs their value in this case, which does involve matter of public concern. And besides, some of those cases are more or less opposed to *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, above referred to.

On the other hand, in some of the states this kind of legislation is sustained as within the police power, or as authorized by reserved powers to amend corporate charters. Among such cases may be cited *Shaffer v. Union etc. Co.*, 55 Md. 74; *State v. Brown & Sharpe Manf'g Co.*, 18 R. I. 16, 17 L. R. A. 856, and *The Opinion of the Justices*, 163 Mass. 589.

We hold, therefore, that the act in question does not deprive the defendant, nor the persons that compose it, of liberty nor property without due process of law; nor deny to them the equal protection of the laws; nor infringe any of their property rights declared by the Constitution of the State.

Judgment affirmed.

STATE v. CHARLES WEBSTER.

Special Term at Rutland, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed November 18, 1907.

Criminal Law—Illegal Sales of Intoxicating Liquor—Prosecution—Sufficiency of Specifications—Discretion—Review.

The sufficiency of specifications filed by the State in a prosecution for illegally selling intoxicating liquor is within the discretion of the trial court, the exercise of which is not reviewable.

A fictitious or suppositional question as to the admissibility of evidence will not be considered.

INDICTMENT for selling intoxicating liquor without authority. Heard on the respondent's motion for better and more complete specifications, at the September Term, 1907, Rutland County, *Hall, J.*, presiding. Motion overruled, and specifications held sufficient. The respondent excepted. Case passed to the Supreme Court before trial.

Frederick S. Platt, and *Butler & Moloney* for the respondent.

Robert A. Lawrence, State's Attorney, for the State.

The trial court having adjudged the specifications to be sufficient, its action is not revisable. *State v. Freeman*, 27 Vt. 523; *State v. Bacon*, 41 Vt. 526; *State v. Davis*, 52 Vt. 376; *State v. Wooley*, 59 Vt. 357.

WATSON, J. The respondent is charged with selling intoxicating liquor without authority. Specifications and amended specifications were filed in the case. A hearing was had on respondent's motion for better and more complete specifications. The State's Attorney stated to the Court that those filed were the best he was able to give. Whereupon the motion

was overruled and the specifications were held sufficient, to which respondent excepted. The exceptions state that it was agreed that the question should be raised not only as to the definiteness of the indictment and specifications, but as though evidence had been offered and received under respondent's exceptions tending to show sales of intoxicating liquor by him unauthorized by law. The cause was passed to this Court before final judgment under the statute.

The question of the sufficiency of the specifications was within the discretionary power of the court and not revisable. *State v. Davis*, 52 Vt. 376.

The fictitious or suppositional question of the admissibility of evidence will not be noticed.

Judgment affirmed and cause remanded.

F. E. DOUGLAS v. CHARLES A. CARR.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed November 18, 1907.

Assault and Battery—Evidence—Trial—Misconduct of Counsel—Improper Argument—Retraction—Effect.

Whether a retraction by counsel of an improper remark to the jury will be held to have cured the mischief done, depends on the spirit and manner in which the retraction is made.

In an action by a railway clerk against a car cleaner for assault and battery, plaintiff's counsel, in his opening statement and during the course of the trial, sought to convey to the jury the idea that the railroad company instigated the assault, and in his closing argument he characterized a witness produced by plaintiff as the attorney of the railroad company, made unfair comments on his

testimony, and then said: "If you were going to send your boy out into the world to earn a living, do you want him to be hounded by the railroad company and its miserable tools?" On objection, he said that he did not want to step over the bounds, but thought from the evidence the railroad company had something to do with the affair, and then withdrew the remark. *Held*, that such withdrawal did not cure the error, which was prejudicial, there being no evidence that the railroad company had any connection with the assault.

Evidence that plaintiff was not in favor with the railroad officials was insufficient to connect such officials or the railroad company with the assault.

TRESPASS for assault and battery. Pleas, the general issue, and a special plea justifying the assault in defence of defendant's possession of a car that he was sweeping and cleaning. Trial by jury at the December Term, 1906, Lamoille County, *Miles, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

Frederick G. Fleetwood, Harland B. Howe, and Herbert W. Hovey, for the defendant.

The spirit of the times is such that railroad corporations are not in good favor with jurors, but their misfortune in that respect should not be visited on the employees who clean their cars. The argument was erroneous and prejudicial. *Sears v. Duling*, 79 Vt. 334; *Montpelier etc. R. Co. v. Macchi*, 74 Vt. 403; *Blaisdell & Barron v. Davis*, 72 Vt. 295; *Wood v. Agostines*, 72 Vt. 51; *Daggitt v. Champlain Mfg. Co.*, 71 Vt. 370; *Ranchau v. Rutland R. R. Co.*, 71 Vt. 142; *Cutler v. Skeels*, 69 Vt. 154; *State v. Fitzgerald*, 68 Vt. 125; *Magoon v. Boston & Maine R. R. Co.*, 67 Vt. 177.

R. W. Simonds for the plaintiff.

In an action for assault and battery, any act of the defendant prior to the assault tending to show ill will or malice toward the plaintiff is admissible. 3 Cyc. 1090, n. 45, and cases cited. All the authorities hold that evidence of the defendant's

insulting manner toward the plaintiff, or his conduct, or declarations indicative of malicious intent or motive is competent evidence of malice. And any evidence tending to show malice or motive is a circumstance tending to show how the assault occurred. *Armstrong v. Noble*, 55 Vt. 428; *Edwards v. Levitt*, 46 Vt. 127; *Howland v. Day & Dean*, 56 Vt. 318; *State v. Emery*, 59 Vt. 84; *Corruth v. Jones*, 77 Vt. 441; Abbott's Brief on Facts, p. 459, §2, and cases cited.

Although it is true, as was held in *Magoon v. R. R. Co.*, 67 Vt. 177, that where, upon objection, the court permits counsel to make improper argument to the jury, that is a ruling that the argument is proper, yet, where, as here, the court stops counsel in such argument there is no such ruling, and so no exception lies. *State v. Young*, 74 Vt. 478; *Machine Co. v. Holden*, 73 Vt. 396.

TYLER, J. Trespass for an assault and battery; plea, justification, replication, *de injuria*. The plaintiff was a mail agent on the St. Johnsbury and Lake Champlain Railroad and the defendant was a car cleaner on that road. At the time of the alleged assault, while a car was standing on a side-track in St. Johnsbury, the defendant was cleaning the smoking-room of the car which also contained the mail-room and the baggage-room. The plaintiff's evidence tended to show that while he was engaged in his work in the mail-room he went into the smoking-room and found fault with the defendant about the water-tank in the plaintiff's room not being properly filled and the lamps not being properly cleaned; that the defendant ordered him to leave the room, pushed him out and shut the door upon him, pinching his fingers in the door; that mail matter had accumulated in that part of the car and that he passed through the room where the defendant was at work for the purpose of removing the mail matter, and that he was rightfully in that room when assaulted. The defendant's evidence tended to show that there was no mail matter in that part of the car, that the plaintiff had no occasion to pass through that room and that he was wrongfully there. The defendant testified that the plaintiff immediately returned to the smoking-room, "stood in front of where the defendant was sweeping," when he again pushed him out. The plaintiff conceded that if any force was

justifiable the defendant did not use unnecessary force in removing him from the room.

The issue made by the parties in their evidence, under the pleadings, was whether the plaintiff was rightfully in the smoking-room while in the performance of his duties, or wrongfully there, as the defendant claimed.

The plaintiff's counsel evidently undertook to try his case upon the theory that the railroad company was responsible for the defendant's acts. In his opening statement to the jury he said that he should show that the plaintiff "had got himself into disfavor with the railroad company prior to the alleged assault; that immediately after the assault the officials" ———. At this point he was interrupted by an exception being taken by the defendant's counsel and he did not finish the remark, nor did he retract it.

The remark was well calculated to give the jury an impression that the company or its officials instigated the assault. It was immediately followed by the plaintiff's attorney calling the defendant as a witness, and, under the defendant's exception, asking him whether, "prior to this fracas" he did not know that there was friction between the plaintiff and the railroad officials, to which the defendant replied that he did know that fact. A question arose upon the competency of such evidence and the attorney informed the court, in the presence of the jury, that he should offer to show, before the trial closed, that the defendant assaulted the plaintiff by direction of one of the railroad officials. In the same line he got before the jury the fact that it was the duty of the railroad company "to take care of the mail part of the car as to cleaning it" and that it employed the defendant for that purpose.

Mr. Blodgett, who was an attorney for the railroad company in other matters, had been called as a witness for the plaintiff. The plaintiff's attorney, in his closing argument, took occasion to characterize him as an attorney for the railroad company and made unfair comments on his testimony. In that argument he also said to the jury: "If you were going to send your boy out into the world to earn a living, do you want him to be hounded by the St. Johnsbury and Lake Champlain railroad company and its miserable tools?" The defendant excepted to the remark and the Court asked the attorney if he

insisted upon it. The latter replied: "I do not want to step over the bounds, but I think from the evidence in the case that the St. Johnsbury and Lake Champlain Railroad Company have had something to do in this affray." The exceptions state that he then withdrew the remark.

It is true that, as a general rule, a full retraction by counsel of an improper remark to the jury is held to cure the mischief done, but that must depend upon the spirit and manner in which the retraction is made. In this case the attorney, under the cover of a formal withdrawal of the remark, expressed his belief that the railroad company was in some way responsible for the occurrence. It seems to have been his purpose throughout the trial, to impress upon the minds of the jurors the idea that the railroad company instigated the assault and was the real defendant. He first stated it in his opening remarks and then drew from the defendant the fact that there was friction between the railroad company and the plaintiff. This was followed by an announcement to the court that he should show that the assault was made by direction of the railroad officials. The remark in the closing argument was made as though he had shown that fact, when no such fact had been proved, nor had been offered in evidence, though he had been told by the court that he might make the offer without objection.

The fact that the plaintiff was not in favor with the Railroad officials would not, in law, have connected them or the Company with the assault.

The remarks made by the plaintiff's counsel to the jury, and those made in their presence, were calculated to mislead them by giving them an impression that the railroad company was connected with the assault, if not legally liable for it. Their natural effect was to prejudice the jury against the defendant and place him at a disadvantage with them, and the case does not show that the court cautioned the jury not to be influenced by them. The case falls within the rule repeatedly laid down by this Court. Judge Veazey said in *Rea v. Harrington*, 58 Vt. at page 190, 2 Atl. 481, that the impropriety and wrong of counsel thus stating or assuming facts in argument which are outside of all evidence are perfectly manifest. If a deliberate act, its object can be only to have the jury

consider as facts something not in the case, and thus induce a verdict not warranted by the evidence. When counsel persistently travel out of the record, basing argument on facts not appearing, and appealing to prejudice, irrelevant to the case and outside of the proof, it not only merits the severe censure of the court, but is valid ground for exception. To state as facts pertinent to the issue, matters not in evidence, or to assume in argument that such facts are in the case, when they are not, is sufficient to reverse a judgment. This is the rule stated in the notes to *McDonald v. People*, 126 Ill. 150, 9 Am. St. R., at page 559, and supported by a multitude of cases there cited. The Court should not be given occasion to enforce these familiar rules.

Judgment reversed and cause remanded.

EDWARD S. MARSH v. RUTLAND RAILROAD COMPANY.

Special Term at Rutland, November, 1907.

Present: ROWELL, C. J., TYLER, and WATSON, JJ., and HALL, Superior J.

Opinion filed November 21, 1907.

Railroads—Negligence—Construction of Farm Crossing—Tenant by Sufferance—Pleadings—Construction—Nominal Damages—Presumptions in Favor of Judgment.

A railroad company locating its spur track across a pasture occupied by a tenant by sufferance owes him no duty to construct suitable farm crossings; for, although such a tenant enters by right, he holds by wrong, has no assignable estate, cannot maintain trespass against the landlord, and is not entitled to notice to quit.

In case in two counts for negligence, where one count is bad and the agreed facts show that the neglects charged in both counts

damaged plaintiff in a certain amount, but do not apportion the damages between the counts, plaintiff is entitled to nominal damages only.

In case in two counts for negligence, where the first count alleged that while plaintiff occupied a pasture as tenant defendant railroad located its spur track across the same and wrongfully omitted to construct suitable farm crossings, and the agreed facts showed that the neglects charged in both counts damaged plaintiff in a certain amount, but without apportioning the damages between the counts, and the trial court gave plaintiff judgment for nominal damages only, in this Court it must be taken that, as to the first count, plaintiff was a tenant by sufferance, to whom the railroad owed no duty to construct crossings, since a count must be construed most strongly against the plaintiff, and all reasonable presumptions must be made in favor of the correctness of the judgment below.

CASE for negligence in failing to construct a suitable farm crossing. Heard on an agreed statement of facts at the September Term, 1904, Rutland County, *Munson, J.*, presiding. Judgment for the plaintiff for nominal damages only. The plaintiff excepted. The opinion fully states the case.

E. S. Marsh for the plaintiff.

While the tenant is in possession, he may maintain, to the same extent as an owner in possession, trespass on the case for negligent injuries to his possessory right. 18 Am. & Eng. Enc. Law, 2nd ed. 453; *McPhillips v. Fitzgerald*, 177 N. Y. 543. If the injury is one to the reversion also, the tenant and the reversioner have separate actions for their several damages. *Davis v. Jewett*, 13 N. H. 88. The tenant can recover such damages as affect his possession and enjoyment of the premises. For injuries to the inheritance the reversioner has an action. *Weston v. Gravlin*, 49 Vt. 507.

H. Henry Powers, and *P. M. Meldon* for the defendant.

ROWELL, C. J. Case in two counts. The first count alleges that for five years next before suit brought, the plaintiff occupied a pasture as tenant; that during his occupancy the de-

defendant located a spur track across the same, and procured the appointment of commissioners to determine the damages, who appraised the same and reported in writing, and as a part of the compensation awarded, required the defendant to make suitable farm crossings for the convenience of the premises; that the track was built on a foundation of stones and rocks, but that the defendant had negligently and wrongfully omitted to make any crossings, without which it is impossible for cattle and teams to cross the track, by reason whereof the plaintiff has suffered damage.

The second count declares upon the defendant's neglect to keep up and maintain the fence between its main line and said pasture, whereby the plaintiff was deprived of the use of the pasture for a time.

The agreed facts show that the neglects declared for in both counts damaged the plaintiff a hundred dollars, but they do not apportion the damages between the counts. The plaintiff had judgment for nominal damages, to which he excepted. He could have judgment for no more, for the damages were not apportioned, and the first count is bad, for it does not show that the plaintiff's estate in the land was such that the defendant owed him any duty in respect of building the crossings. True, it alleges that he occupied as tenant, but the nature of his tenancy is not disclosed, whether for years, from year to year, at will, by sufferance, or what otherwise it was.

As the count must be construed most strongly against the plaintiff, there being nothing here to modify the application of that rule, as there was in *Royce v. Maloney*, 58 Vt. 437, 445 5 Atl. 395; and as all reasonable presumptions must be made in favor of the correctness of the judgment below,—it must be taken that the plaintiff was tenant by sufferance, which is the least of all tenancies; for although such a tenant enters by right, he holds by wrong. He has no assignable estate; cannot maintain trespass against the landlord; is not entitled to notice to quit.

It is unnecessary to consider the second count, for if good, the judgment is right; and if bad, the defendant does not question the judgment.

Judgment affirmed.

EDGAR H. DAVENPORT v. CHARLES H. DAVENPORT AND EDWARD C. CROSBY.

Special Term at Brattleboro, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed November 23, 1907.

Mortgages—Purchase and Foreclosure of First Mortgage by Second Mortgagee—Evidence—Assignment—Certified Copy of Record—Master's Report—General Reliance on Voluminous Exceptions—Consequence.

It was not inequitable for a second mortgagee of real estate to purchase and foreclose the first mortgage, although at the time of such purchase and foreclosure there were certain contracts between him and the mortgagor, distinct from the first mortgage and in no way relating thereto, touching matters of the holding of the real estate under the second mortgage, and collaterals held by the former as security for signing notes for the latter, and against payments that he might be obliged to make thereon.

In a proceeding by a second mortgagee of real estate to foreclose the first mortgage, which he had purchased, a certified copy of the assignment of the first mortgage to the petitioner was properly received as evidence of that assignment, it not appearing that any objection was made to its form.

The prayer prescribed in the statutory form for a petition to foreclose a real estate mortgage, "that the equity of redemption in the premises may be foreclosed agreeably to the provisions of law," is sufficient to warrant a decree shortening the usual time of redemption, and, hence, the reception of evidence bearing on that question.

Where three pages of exceptions to a master's report are relied on generally, without stating why, or more specifically regarding any of them, either in the brief or argument, the exceptions will not be considered.

APPEAL IN CHANCERY. Heard on pleadings, master's report and exceptions thereto, at the April Term, 1907, Windham County,

Taylor, Chancellor. Decree for the petitioner. Defendants appealed.

On June 1, 1900, defendant Charles H. Davenport and his wife, who has since deceased, executed to the Brattleboro Savings Bank, a mortgage deed of a house and lot in the village of Brattleboro, conditioned for the payment of \$3,000, specified in two promissory notes, each payable to said bank on demand with interest semi-annually, one note for \$2,400, signed by Charles H. Davenport, and the other for \$600, signed by him and Edward C. Crosby. On March 31, 1906, the Brattleboro Savings Bank, by an instrument signed, sealed, witnessed, acknowledged, and recorded, assigned this mortgage to the petitioner, and indorsed to him the two notes thereby secured, which is the mortgage here sought to be foreclosed. On December 15, 1900, Charles H. Davenport and his said wife duly executed and delivered to the petitioner a warranty deed of said premises, subject to said mortgage. On December 17, 1900, the petitioner and Charles H. Davenport executed a written agreement between them, wherein it was recited that the latter had deeded said premises to the former, had assigned to him certain corporate stock and certain rights of action, and had assigned a life insurance policy to a certain bank as collateral security for his notes held by it, on which the petitioner was surety; and that the petitioner was also surety for said defendant on certain other notes held by certain other banks. In that agreement the petitioner also acknowledged that he held all said property so assigned or transferred to him "in trust, and as collateral to secure me for so signing and indorsing said notes, and when all of said notes are fully paid and I am saved harmless from all liability on account thereof, then I shall redeed said house and lot to C. H. Davenport," and transfer to him the remainder of said property. On February 28, 1903, the same parties executed another written contract between them, wherein it was recited that Charles H. Davenport "is largely indebted" to the petitioner on account of the payment by him of notes that he signed as surety for said Charles, and that as security for such indebtedness the petitioner held said deed of said house and lot and also certain corporate stock and other collateral; and wherein the petitioner agreed that if Charles H. Davenport should pay him \$4,000, with interest from May 1, 1903, out of the proceeds of a claim held by the

petitioner as collateral and which was then in litigation, the petitioner would release to him all collateral except a certain life insurance policy, including the balance of said claim in litigation. Defendant Davenport claimed that the petitioner had so violated these agreements that it was inequitable for him to purchase or foreclose the bank mortgage here in question.

Gibson & Waterman for the petitioner.

Arthur P. Carpenter, and Frank E. Barber for the defendants.

WATSON, J. The petitioner, a second mortgagee by virtue of a warranty deed in form but in fact a mortgage as between the parties, purchased the first mortgage, the same being duly assigned to him by an instrument signed, sealed, witnessed, acknowledged, and recorded. It is this mortgage which he here seeks to foreclose. At the time of the purchase, there were two contracts of prior dates in force between the petitioner and the defendant, touching matters of the holding of the real estate under the second mortgage, and collaterals held by the former as security for signing notes as surety for the latter, and against payments which he might be obliged to make thereon. But these contracts are entirely distinct from the first mortgage, and in no way relate thereto. Nor is the petitioner's position under the contract such as to render it inequitable for him to purchase the first mortgage as he did, or to enforce it by foreclosure proceedings while the contracts are yet in force and being acted under.

As evidence of the assignment of the first mortgage, a certified copy of the record was received subject to objection. In substance the evidence was proper, and it does not appear that any objection was made to its form.

The petition and prayer are in the statutory form, the latter being, "that the equity of redemption in the premises may be foreclosed agreeably to the provisions of law." Evidence was received by the master showing the value of the premises, against the objection that the prayer does not ask for shortening the time to redeem from one year, the time usually allowed for that purpose. But no prayer in terms specifically touching the time was essential to the admissibility of such evidence. For in

a case of strict foreclosure it is an incident of the remedy that the mortgagor be allowed a specified time, fixed by the decree, for the payment of the debt. The course is to fix a time in which the amount found due on the mortgage shall be paid, and on failure of payment within the time limited, the equity of redemption to be foreclosed. *Smith v. Bailey*, 10 Vt. 163; *Perine v. Dunn*, 4 Johns. Ch. 140; *Clark v. Reyburn*, 75 U. S. (8 Wall.) 318, 19 L. ed. 354. In the case last cited the decree of foreclosure was unconditional and made absolute at once, as to some of the defendants, without giving them time for the payment of the debt and redemption of the property. This was held to be a fatal defect in the decree. The time allowed for that purpose, says Chancellor Kent in *Perine v. Dunn*, rests in discretion, and is to be regulated by the circumstances of the particular case.

It is urged in defendants' brief that the exceptions to the master's report, printed in the record,—covering three pages,—should have been sustained, without stating why or more specifically regarding any of them. In argument defendants' solicitor was asked by the Court if he could point out any particular exception on which he relied more than others, to which he answered that he could not, but that he relied upon them all. In such circumstances the Court will not hunt for errors.

Decree affirmed and cause remanded. Let a new time of redemption be fixed below.

W. W. CATE v. FIFE & CHILD.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed November 26, 1907.

Trover—Evidence—Title to Property—Acts Constituting Conversion—Admissibility of Books of Account—Witnesses—Scope of Cross-Examination—Discretion of Court—Instructions—Presumptions.

Where the ownership of personal property is a material and ultimate fact to be determined on conflicting evidence, witnesses in respect thereof should be confined to stating facts within their knowledge that bear thereon, and not be allowed to give their conclusions or opinions as to the ultimate fact.

In *trover* for the conversion of a quantity of wood and lumber, where it appeared that the parties had been associated in the lumber business, and that in January, 1905, they had a settlement in which defendants agreed to relinquish any right or interest that they, or either of them, might have in any property that theretofore might "have been sold or disposed of" by plaintiff, the court properly excluded plaintiff's evidence, offered for the purpose of showing that, in consequence of said settlement, defendants did not own the wood in question when this suit was brought, that in November, 1903, plaintiff mortgaged that wood to secure all he then owed or might thereafter owe the mortgagee, with the verbal understanding that he might sell the wood, apply the proceeds on such indebtedness, and pay any excess to plaintiff; there being no offer to show that the mortgagee had exercised any control over the wood, nor that it had been in any way "sold or disposed of"; nor that the condition of the mortgage had been broken.

It is better practice to limit cross-examination to matters inquired about in the direct, but that rests in the discretion of the trial court.

If error, it was harmless, to allow plaintiff to be cross-examined as to his understanding on a matter about which there was no dispute.

In trover for lumber, where defendants admit the conversion, unless they establish their ownership, the court properly excluded plaintiff's offered evidence that defendants had threatened him with arrest for having taken some of the lumber in question, and that they denied his right to any part of it.

In trover for the conversion of property on which defendants claimed to have held a mortgage, a tax inventory of defendants', showing the amounts due from solvent debtors, was inadmissible on the question of the right to the property, where it did not appear that plaintiff was a solvent debtor when the inventory was made.

In an action of trover, where the issue is whether the parties were governed by a verbal agreement or by a prior written contract, defendants' books containing accounts between the parties are admissible to show whether plaintiff had been credited with items to which he would be entitled under the written contract.

Where parties to a written contract enter into a verbal agreement, and the only issue is whether they agreed on new terms or to continue under the old contract, a requested instruction that there was no presumption of a continuance of the written contract was properly refused.

TROVER for a quantity of wood and lumber. Plea, the general issue. Trial by jury at the March Term, 1907, Washington County, *Miles, J.*, presiding. Verdict and judgment for the defendant. The plaintiff excepted. The opinion sufficiently states the case.

R. E. Bullard and *H. C. Shurtleff* for the plaintiff.

It was error to exclude plaintiff's offer that, previous to the settlement he had mortgaged the wood in question; with the privilege in the mortgagee of selling the wood and applying the proceeds on the mortgage indebtedness. By that mortgage plaintiff "sold and disposed of" the wood within the meaning of the contract of settlement. *Coulter v. Lamphkin*, 88 Ga. 277.

The inventory offered was a sworn statement of defendants contradicting their position taken in the trial, and it was error to exclude it. *Morse v. Bruce's Est.*, 70 Vt. 378.

R. M. Harvey, and *R. W. Hulburd* for the defendants.

The court properly refused to allow defendant to be asked whether he owned the wood; that was an ultimate fact for the jury to determine on the conflicting evidence as to the facts and circumstances in issue. *Simpson v. Smith & Barnes*, 27 Kan. 565; *Kirkpatrick v. Clark*, 8 L. R. A. 511; *Clough v. Patrick*, 37 Vt. 421; *Richler v. Ruse*, 171 N. Y. 577; *Olson v. O'Connor*, 81 Am. St. Rep. 595; 17 Cyc. 223 and notes.

TYLER, J. Trover for a quantity of wood and lumber. The defendants claimed to own the property and denied converting it if the plaintiff owned it. The exceptions are to the rulings admitting and excluding testimony and to the refusal of the court to comply with one request to charge.

In the year 1895 the plaintiff was engaged in lumber business with defendant Child, and his evidence tended to show that he made a verbal contract with both the defendants, by which they were to furnish him money to buy logs, pay his help, insurance, taxes, and all other general expenses incident to the business; that they were to market the manufactured lumber and receive from him one dollar per thousand feet sold with interest on the money so furnished.

The defendants denied making a verbal contract, and their evidence tended to show that, instead of so doing, they and the plaintiff adopted, without signing, a written contract that the plaintiff and Child made in January, 1893, and operated under down to 1895, by which the plaintiff was to measure all the logs and lumber, saw the logs, prepare the lumber for market and deliver it on the cars for Child, at Wolcott, for specified prices, and that Child should pay over to the plaintiff all money received therefor after deducting expenses and a profit that Child, by the agreement, was to receive.

It appeared that some kind of an agreement was made between the plaintiff and these defendants, by which the latter were "in some way to finance the plaintiff in his lumber business." The plaintiff mortgaged his farm, a house and lot and his mills to the defendants to secure the payment of his note of ten thousand dollars and all other indebtedness to them, and in November, 1896, further secured them by a chattel mortgage on the logs and lumber situated about the mills.

The logs brought from the plaintiff's farm were, by agreement, to be treated by the defendants, in keeping their accounts,

the same as logs purchased with money advanced by them, but they denied that any wood and lumber sued for came from the plaintiff's land.

These parties carried on business thereafter until December, 1903, and it was a material question in the trial whether they operated under the written contract, or under a new verbal one, for the court ruled, without exception by the plaintiff, that under the written contract the logs were Child's and that he had a right to sell and dispose of all the products thereof.

In December, 1903, the plaintiff, on account of some disagreement with the defendants, refused to continue the business and the defendants took possession of the mills by virtue of their mortgages and conducted the business until January, 1905, when they brought a foreclosure suit which was referred to a master but afterwards settled by what was called during the trial the "settlement contract."

When the defendants took possession there was in the mill-yards a quantity of rough and dressed lumber and slab-wood which their evidence tended to show was largely sawed from logs that were brought there under the contract existing between the parties after the chattel mortgage was given. They also claimed that, if any logs or lumber were in the mill-yard when that mortgage was given, they were included in its terms.

It was conceded by the plaintiff that the ownership of the lumber was the same as that of the logs from which it was sawed. The defendants claimed a right to sell the lumber by virtue of the written contract and also under their chattel mortgage, the condition of which they claimed had been broken when they took possession. Their evidence tended to show that the slab-wood that they had sold and for which the plaintiff seeks to recover was sold and credited to the plaintiff before the settlement contract was executed. The plaintiff claimed to recover both for what defendants had sold and what remained unsold and denied that the written contract was in force or that the condition of the mortgage had been broken. The main controversy was about the ownership of the property sold by the defendants, and this seems to have depended largely upon whether the parties proceeded under the old or a new contract. This is a sufficient statement of the questions in issue to show the relevancy of the exceptions to be considered.

1. The plaintiff called defendant Fife as a witness and in the course of his examination asked him: "Do you own that wood or does Mr. Cate?" The answer was excluded and the plaintiff excepted. There was no error in the ruling for the question was for the determination of the jury upon conflicting testimony. It is the general rule that, when ownership is a material and ultimate fact to be determined, and is controverted upon the trial, the witnesses should testify to the principal facts within their knowledge which bear upon such question, and not give their mere opinions and conclusions thereon. *Olson v. O'Connor*, 81 Am. St. Rep. 595, 9 No. Dak. 504, and cases cited in the opinion. But the Court there said that all the authorities were that where the answer as to ownership is direct, but is subsequently qualified by a statement of the facts relative to it, or tending to show such ownership, and discloses the facts upon which the answer is based, the error is cured. In the present case it is evident that the answer could only have been the expression of the witness' opinion upon the controverted questions whether the written contract was continued in force, or whether a new contract was made, and whether the defendants had a right to take possession of the wood and lumber under their mortgage. Besides, the exclusion of the answer could not have harmed the plaintiff unless it would have been that *he* owned the property inquired about, and there was no intimation to the court that such an answer, which was at variance with the whole claim of the defence, was expected; and it would not have aided the plaintiff's claim of conversion if the witness had answered that the *defendants* owned the property for the exceptions state that the defendants claimed ownership.

2. The "settlement contract," made Jan. 27, 1905, contained this clause: "and the parties of the first part (the defendants) further agree, * * *, to relinquish any claim, right, or interest, by way of mortgage or otherwise, that they or either of them may have in or to any property, real or personal, or the proceeds thereof, that may have been sold or disposed of by the parties of the second part or either of them previous to the date above mentioned." The plaintiff offered to show by one Haskell that the plaintiff, in November, 1903, mortgaged said wood to him, conditioned to pay all that the plaintiff owed him or might thereafter owe him, with a verbal understanding that Haskell might sell the wood and apply the proceeds on such

indebtedness and pay any excess to the plaintiff. The purpose of the offer was to show that the defendants did not own the wood when this suit was brought. There was no offer to show that Haskell had taken possession of, or moved the wood from the premises, or exercised any control over it, nor that it had in any way been "sold or disposed of," nor that the condition of the mortgage had been broken so that Haskell had a right to sell the property, therefore the offer was properly excluded.

3. While the plaintiff was under cross-examination he was asked if he did not understand that the defendants took the place of Child in the business. No inquiry had been made of the plaintiff upon this subject in his direct examination. The plaintiff answered, subject to his exception, that Fife so informed him, and said that the Child lumber and the Fife & Child lumber need no longer be kept separate. It is the better practice to limit the cross-examination of a witness to matters inquired about in the direct, but this rests in the discretion of the trial court. *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488. It is true that the plaintiff could only state in his answer what defendant Fife told him, but the facts appeared in the case without objection by the plaintiff that he and Child at first did business together and that the defendants succeeded Child in the business. These facts were a part of the history of the business, and the question only called for the plaintiff's understanding of a subject about which there seems to have been no dispute. It was not reversible error to admit the answer. *Linsley v. Lovely*, 26 Vt. 123.

4. The plaintiff offered to show that at the trial in the foreclosure suit the defendants testified that they had threatened the plaintiff with arrest for having taken some of the lumber of which the lumber in suit was a part, and denied his right to any part of it. The offer was properly excluded. The threats and denials, if made, were consistent with the defendants' claim of ownership of at least a part of the lumber. They were immaterial as tending to show a conversion of the lumber by them for they admitted the conversion unless they establish their ownership of the property.

5. The plaintiff offered in evidence the defendants' tax inventory of 1903 as bearing upon the question of the ownership of the property in controversy and to contradict the defendants upon the question of the condition of the mortgages being broken.

The inventory was produced and identified and it showed that the defendants swore therein that there was only five hundred dollars due them from solvent debtors, including accounts, notes, contracts and mortgages on real and personal estate. The offered evidence was excluded. The real estate and the chattel mortgage seem to have been given by the plaintiff to the defendants at the time the defendants succeeded Childs in business, and to secure them for money furnished. In December, 1903, the plaintiff, on account of some disagreement with the defendants, refused to manufacture lumber, and the latter took possession of the mills and carried on the business until January, 1905, when they foreclosed their mortgages. If this answer in the inventory had been admitted in evidence what argument could the plaintiff have based upon it? He could not have claimed that he was a solvent debtor in April, 1903, for there was no evidence in the case tending to show such fact; nor that the defendants' security was adequate; on the contrary, the fact that in December, 1903, the defendants took possession of the mortgaged property, and in January, 1905, foreclosed their real estate mortgage which resulted in the settlement contract in which the plaintiff admitted that twenty thousand dollars was due the defendants in equity, tended to show that their notes and accounts were not due from a solvent debtor when they made their inventory. The case does not show the value of the mortgaged property as compared with the amount of the defendants' demands against the plaintiff, and for anything that appears in the case the answer in the inventory was correct.

6. The plaintiff offered in evidence the books of accounts kept by the defendant Fife of the transactions between the parties for the purpose of showing that they conducted the business under a new contract and not under the written one. The plaintiff did not claim that the books contained any evidence of conversion of the property sued for, but that they showed that the defendants had not paid or credited the plaintiff with kiln-drying and dressing different kinds of lumber as provided in the written contract. The exceptions show that Fife kept the books and entered on one side all receipts from the business and on the other side all sums paid out by the defendants. The defendants did not claim that the books showed items of credit for kiln-drying and dressing lumber unless they were included in gross sums credited to the plaintiff. The plaintiff claimed that

these gross sums did not include the items for kiln-drying and dressing lumber. The credit side of the books was first offered and excluded and afterwards both sides were excluded. The precise point of the exception to this ruling was not that the books were incorrectly kept, but that they were correct and failed to show credits to the plaintiff which would have appeared if the parties had been conducting business under the written contract. It may be true that "gross amounts" included these items, but whether they did or not was a fact for the jury to determine upon proper evidence. If those items were not credited to the plaintiff, the fact of their omission tended to show that the parties were operating under a new contract. We think the exclusion of the books for the purpose for which they were offered was error.

7. The defendants' counsel said in argument to the jury that after defendant Fife began dealing with the plaintiff the parties were presumed to continue to transact business under the written contract as the plaintiff and Child had previously done. In the circumstances of this case there was no legal presumption of a continuance of the written contract, like the presumption of the continuance of life, or sanity, or even of a partnership, for here it was conceded that after the plaintiff and Child had been in business two or three years under the written contract, a verbal agreement was made between the plaintiff and both defendants by which the latter were "to finance the plaintiff," etc. So there was an interruption of the former agreement, and the question was whether the parties then agreed upon new terms, or to continue business under the terms of the old contract. From what appears in the exceptions we do not understand that the defendants' counsel was stating a legal presumption to the jury, but argued, as a presumption of fact, that the terms of the written contract were adopted. A schedule of prices having been adopted in the written contract to be allowed the plaintiff for kiln-drying and dressing the lumber, it was legitimate argument to urge to the jury that it was a reasonable presumption that the parties conducted the business under that schedule, especially if the evidence did not disclose a reason for a change in prices. Prof. Greenleaf says, Vol. 1, § 44, that presumptions of fact are mere arguments, of which the major premise is not a rule of law; that they belong equally to any and every subject-matter, and are to be judged by the common and

received tests of the truth of propositions and the validity of arguments; that while presumptions of law depend upon fixed rules, these natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind. There was no error in the refusal of the court to comply with the plaintiff's request made at the end of the charge to instruct the jury that there was no presumption of a continuance of the written contract.

Judgment reversed and cause remanded.

STATE v. EUGENE SARGOOD.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and HASELTON, JJ.

Opinion filed December 3, 1907.

Criminal Law—Evidence—Judgment on Prior Conviction—Admissibility and Effect—New Trial—Newly Discovered Evidence—Lack of Due Diligence—Wife Made Competent Witness by Divorce—Whether Newly Discovered Evidence.

As a general rule, a judgment in a criminal case is admissible and conclusive evidence in a subsequent criminal prosecution against the same respondent as to any relevant fact determined by the judgment.

Where a person who had been convicted of poisoning certain colts was subsequently prosecuted for an attempt to poison the man and his wife in whose barn the colts were kept, and the State's evidence in the subsequent trial tended to connect the respondent with each offence by a motive and purpose that included both, in the second trial, the record of the respondent's former conviction was admissible and conclusive evidence against him that he poisoned the colts.

The fact that the former wife of a person who has been convicted of a crime has procured a divorce from him since his conviction, and has thus become a competent and important witness, affords him no basis for a petition for a new trial on the ground of newly discovered evidence.

The fact that since a respondent was convicted of poisoning colts a chemist has made an analysis that discredits in some respects the case made by the State regarding the liquid used by the respondent, does not warrant the granting of a new trial on the ground of newly discovered evidence, where the desirability of so discrediting the State's case could not have been overlooked in the preparation for trial, and evidence of the character relied on could then easily have been produced.

INFORMATION for attempting to poison Sanford Hicks and his wife. Plea, not guilty. Trial by jury at the December Term, 1904, Bennington County, *Powers, J.*, presiding. Verdict, guilty, and judgment thereon. The respondent excepted. See *State v. Sargood*, 77 Vt. 80.

The respondent also brought his petition for a new trial, under V. S. 1662, on the ground of newly discovered evidence, to the Supreme Court for Bennington County, at its October Term, 1905, which petition was then heard with the exceptions.

James K. Batchelder, and *D. A. Guiltinan* for the respondent.

W. R. Daley, State's Attorney; and *O. M. Barber* for the State.

MUNSON, J. The statement given in the opinion in *State v. Sargood*, 77 Vt. 80, will serve as a sufficient statement of the case now before us, both as regards the theory of the State and what its evidence tended to show. The offence charged in the first case was the poisoning of certain colts, and the offence charged here is an attempt to poison Sanford Hicks and his wife. The State claimed to connect the respondent with each offence, by a motive and purpose which included both. The relation of the two cases is such that the decision in the former case sustaining the admissibility of evidence of an attempt to

poison the Hickses, is authority for now holding that evidence of the poisoning of the colts was admissible in this case.

The court received in evidence the record of the respondent's conviction on the charge of poisoning the colts, held that it was conclusive proof of the fact, and excluded testimony offered by the respondent to show the contrary; to all of which the respondent excepted. These rulings were correct. With some exceptions not material here, a judgment in a criminal case is admissible and conclusive evidence in another criminal case against the same defendant, as to any fact determined by the judgment. 1 Green. Ev., § 537 n; *Commonwealth v. Evans*, 101 Mass. 25; *Commonwealth v. Ellis*, 160 Mass. 165; *Mitchell v. State*, 140 Ala. 118, 103 Am. St. 17, and note; see *State v. Adams, Claimant*, 72 Vt. 253.

Judgment that the respondent take nothing by his exceptions.

THE PETITION for a new trial is based in part upon the affidavit of the former wife of the respondent, who has procured a divorce since his conviction, and has thus become a competent witness. It is apparent that her evidence is not newly discovered in the proper sense of the term. It is evidence that the respondent knew of, but did not have because it was not available. If within the rules applicable in such cases, the respondent should have moved for a postponement of the trial until the desired testimony could be made available. It needs but this suggestion to show that the case does not stand on any recognized ground of relief. The respondent did not have this evidence when tried because the law did not permit it. The granting of the petition on this ground would amount to a judicial extension of the remedy to all cases where an incompetent witness is made competent by legal proceedings or legislative enactment. In the only similar case of which we have knowledge, the application was denied. *Sawyer v. Merrill*, 10 Pick. 16.

The petition is also supported by the affidavit of a chemist regarding an experiment with and analysis of a mixture corresponding to the washing fluid given to Mrs. Hicks by Mrs. Eastman, which tends to discredit in some respects the case made by the State regarding the liquid claimed to have been put into the cups by the respondent. The evidence of the analysis

made of that liquid at the state laboratory was received on the trial for poisoning the colts. The facts regarding the washing fluid were introduced by the respondent at the same trial. It was to be expected that the state chemist would testify, and he did testify, as to his analysis and its results, substantially the same on the second trial as on the first. The desirability of discrediting his testimony could not have been overlooked in the ordinary preparation of the defence. If counsel had concluded to undertake this, they could easily have been prepared with opposing testimony of the character disclosed by the affidavit, before the trial commenced. A new trial cannot be granted on evidence of this character under these circumstances.

Petition dismissed.

STATE v. EUGENE SARGOOD.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and HASELTON, JJ.

Opinion filed December 3, 1907.

Perjury—Indictment in Statutory Form—Sufficiency—Evidence—Record of Conviction—Force in Subsequent Trial for Perjury in Swearing to Innocence.

An indictment for perjury in the form prescribed by V. S. 5417, Form 48, is sufficient, although it fails to allege by what court, magistrate, or person the oath to the respondent was administered on the occasion when the crime is alleged to have been committed.

It is not an element of the crime of perjury that when he gave the evidence in question the perjurer had knowledge of its materiality. The general rule that the determination of an issue of fact in a criminal case is conclusive thereof in a subsequent criminal proceeding between the same parties, does not apply where the measure

of proof required in the adjudged case was not so great as that required in the case on trial.

The record of the conviction of a crime is not conclusive evidence against the respondent that he committed it, in his subsequent prosecution for alleged perjury in testifying on such former trial that he was innocent of that crime. To hold so might violate the rule that there can be no conviction of perjury on the uncorroborated testimony of a single witness.

Quaere, whether an acquittal of a crime is a conclusive adjudication in the respondent's favor in a subsequent prosecution for perjury committed in swearing to his innocence on the former trial.

INDICTMENT for perjury. Plea, not guilty. Trial by jury at the December Term, 1904, Bennington County, *Powers, J.*, presiding. Verdict, guilty; judgment and sentence thereon. The respondent excepted. The respondent also filed a general demurrer to the indictment, in the ordinary form, signed by him by his attorney, and then added a statement, signed in like manner, setting down as causes of demurrer, "among others," only that in neither count of the indictment is it alleged "by what court, magistrate, or person, or by whom the oath to this respondent was administered when he is claimed to have committed the crime of perjury as set forth in each and every count, or that said court, magistrate, or person had competent authority to administer such or any oath. And also that said counts, and each of them, is and are in other respects uncertain, informal, and insufficient." Demurrer overruled, and indictment adjudged sufficient; to which the respondent excepted. That exception was ordered to lie.

Batchelder & Bates, and *D. A. Guiltinan* for the respondent.

The record of his conviction for poisoning the colts was not conclusive against the respondent that he did poison them, on his subsequent trial for perjury in swearing to his innocence. The test of whether a conviction is conclusive, if it ever is conclusive in the trial of criminal cases, is this: There must be a legal identity of the two offences. Could the respondent upon any evidence that might have been produced on the first trial have been convicted on that trial of the offence charged in the

second? *Com. v. Bakeman*, 105 Mass. 55. Though both indictments refer to the same transaction, this is not decisive of the legal identity of the two offences. *Com. v. Haines*, 11 Gray 308; *Com. v. Bubser*, 12 Gray 89; 2 Freeman on Judg. § 256 and cases cited. Here the two cases are entirely different. One was for poisoning colts, the other for perjury. The testimony in the first case to prove the poisoning was admissible in the case for perjury. But evidence in the first case that was admissible could not alone convict in the second. *Irvin v. State*, 7 Tex. 78; *Smith v. State*, 85 Ind. 553; *State v. Weber*, 76 Iowa 687; *Pierce v. State*, 10 Ohio 423; *Com. v. Trimmer*, 84 Pa. 65. The issue in the former trial was collateral to the real issue in this trial.

The former judgment should have been pleaded in order to be conclusive. *Isaacs v. Clark*, 12 Vt. 693; *Perkins v. Walker*, 19 Vt. 145; *Com. v. Cramer*, 39 Atl. 671; *Johnson v. People*, 55 N. Y. 513; *Metcalf v. Gilmore*, 63 N. H. 174; *Vaughn v. Morrison*, 55 N. H. 580; *Parker v. Russell*, 43 N. H. 625; *Wheeler v. Bancroft*, 18 N. H. 578; *Coville v. Gilman*, 13 W. Va. 314; *King v. Chase*, 15 N. H. 480; Herman on Estoppel, 541; *Wright v. Butler*, 6 Wend. (N. Y.) 284.

In order to convict the respondent in the perjury case it was necessary to establish the fact of the materiality of his testimony in the former case, and also to show its falsity, by competent evidence. That it was material there can be no question. He testified he did not poison the colts. The State must show he did. It did show it in the poisoning case, we must assume, by evidence competent so far as that case was concerned. But we cannot assume that it showed it by evidence sufficient to establish the fact in case of perjury. The rule that requires more than one witness to convict of perjury is founded on the principle that every man is presumed to be innocent until he is proven guilty; and until discredited the oath of a respondent must be considered as that of a creditable witness and have that effect. With but the testimony of one witness against his testimony the scales just balance, and enough evidence must be thrown into the side of the State, either by another witness or by material and independent circumstances, to weigh down the testimony of the respondent before he can be convicted. As before stated, it does not appear that more than one witness testified to material

facts on the part of the State in the poisoning case, or if it did appear, or it were to be assumed that more than one did testify, that does not signify. The jury may or may not have believed but one witness in the trial of that cause. In a trial for perjury the respondent has a right to have the court instruct the jury that one witness is not sufficient to convict, and that his testimony must be corroborated by witnesses that the jury believe, or by material facts or circumstances; and he had the further right to have the jury instructed as to what such corroborating testimony and circumstances were. Of this right he was wholly deprived under the ruling of the court excluding any evidence as to the guilt or innocence of the respondent in the poisoning case; and its denial of the right on the part of the respondent to introduce testimony showing that he did not poison the colts, was error. *Schwartz v. Com.*, 21 Am. Rep. 365; 3 Whart. Ev. § 2275; 1 Greenl. Ev. § 257 (13th ed.); *U. S. v. Wood*, 14 Pet. 440; *People v. Stone*, 32 Hun. 41; *McClerkin v. State*, 20 Fla. 879; *Graham v. State*, 16 Tex. App. 215; *People v. Davis*, 61 Cal. 536; *Williams v. Com.*, 91 Pa. St. 493, *Com v. Parker*, 2 Cush. 212.

The demurrer should have been sustained. All the essential facts, all of the ingredients of which the offence is composed, must be accurately and clearly expressed. The indictment does not set forth with sufficient certainty and clearness facts necessary to inform the accused of the crime charged against him. It does not meet the requirements of section 5083 of Vermont Statutes, or the requirements of the Constitution, nor the rules laid down by this Court. *U. S. v. Mann*, 95 U. S. 580; *State v. Rowell*, 70 Vt. 405; *State v. Estabrook*, 70 Vt. 412; *State v. Dow*, 74 Vt. 119.

The indictment should have been held bad on demurrer because it contained no averment that the proceedings were such where an oath was required by law to be taken. *State v. Rowell*, 70 Vt. 405; *People v. Fox*, 25 Mich. 497; *People v. Gage*, 26 Mich. 30.

W. R. Daley, State's Attorney, and O. M. Barber for the State.

The indictment is in the statutory form and is sufficient. *State v. Camley*, 67 Vt. 322; *State v. Corson*, 59 Me. 137.

The record of his conviction of poisoning the colts is conclusive against the respondent that he committed that crime, in any subsequent prosecution. *State v. Dewey*, 65 Vt. 196. In that case the Court said: "That the judgment of a court of competent jurisdiction directly upon a principal point, is, as between the parties, conclusive in relation to such point, though the purpose and subject matter of the two suits be different." There is no difference in principle between that case and the one at the bar. There, however, the doctrine of *res judicata* was invoked in favor of the respondent. For other cases holding the same doctrine see, *Cooper v. Com.*, 45 L. R. A. 216; *Coffey v. U. S.*, 116 U. S. 436, 29 L. R. A. 684; *State v. Waterman*, 87 Iowa 255; *People v. Allen*, 1 Parker Cr. R. (N. Y.) 445; *State v. Lang*, 63 Me. 215; *Com. v. Austin*, 97 Mass. 595; *Com. v. Evans*, 101 Mass. 25; *Com. v. Feldman*, 131 Mass. 588; *Com. v. Ellis*, 160 Mass. 165; 2 Van Fleet, Former Adjudications, 1246 and 1247.

MUNSON, J. This is an indictment for perjury alleged to have been committed on an inquiry before the grand jury regarding the poisoning of certain colts, and upon the trial in county court of an indictment charging the respondent with poisoning them. The respondent demurred to the indictment, showing for cause of demurrer that in neither of the counts is it set forth by what court, magistrate or person the oath to the respondent was administered on the occasion when the crime is alleged to have been committed. The indictment follows the statutory form, and the statutory form is sufficient in this particular. *State v. Camley*, 67 Vt. 322. This being the only point made in support of the demurrer in the court below, the other matters now suggested will not be considered. *State v. Schoolcraft*, 72 Vt. 223.

It is claimed that the court erred in permitting the jury to base a conviction upon certain statements made to the grand jury, inasmuch as it did not appear that the respondent knew what person or matter was being investigated, and so could not understand what statements had bearing or weight. We are referred to no authority, and have seen none, that treats knowledge of the materiality as an element of the crime.

It is objected that the court erred in instructing the jury that certain statements were material to the issue. It is clear that

all of them were statements that might properly have influenced the jury in reaching its conclusion, and this was sufficient. 2 Bish. Cr. Law, 3rd Ed. § 998.

It is charged that the respondent committed perjury in testifying on his trial for poisoning the colts that he did not poison them. The court held that the record of his conviction in that case was conclusive proof against him in this case that he did poison them. The respondent insists that this was error.

It has been repeatedly held that the determination of an issue of fact in a criminal case is conclusive thereof in a subsequent criminal proceeding between the same parties. 24 A. & E. Ency. Law, 2d Ed. 831; *Mitchell v. State*, 140 Ala. 118, 103 Am. St. 17 and note. The rule is commonly stated without recognizing any exception, but is to be taken with some limitations.

The few cases bearing upon the precise question before us are reviewed by Mr. Freeman in the note above cited. It has been held that a prior acquittal of an offence is a conclusive adjudication in the respondent's favor upon a subsequent trial for perjury committed in swearing to his innocence. *United States v. Butler*, 38 Fed. 498; *Petit v. Com.* 22 Ky. Law. 262; *Cooper v. Com.*, 106 Ky. 909; 90 Am. St. 275. There was a dissenting opinion in the case last cited, and there seems to be substantial ground for questioning these decisions. The reasoning amounts to this: The respondent procures an acquittal by his own perjury, and that acquittal is conclusive evidence that he did not commit perjury. But if the adjudication is not to be held conclusive in the respondent's favor, the ordinary rule of mutuality would require that it be not held conclusive against him. This may not follow, however, when the holding is placed upon the ground that the acquittal was procured by the respondent's fraud. It has been held in other cases that an acquittal is not an adjudication that the respondent did not commit perjury in denying his guilt. *State v. Caywood*, 96 Iowa 367; *Hutcherson v. State*, 33 Tex. Cr. 67. It is said in the case last cited, but without stating the grounds of the conclusion, that such evidence is not admissible to show either the guilt or the innocence of a defendant.

The rule under consideration does not apply unless the measure of proof required in the adjudged case was as great as that required in the case on trial. *Riker v. Hooper*, 35 Vt. 457. This alone will ordinarily prevent the application of the

rule when one case is civil and the other criminal. Freeman on Judg. § 319 a. Nor does the doctrine apply when the rules which determine the instruments of proof are different. 1 Green. Ev. § 537. The fact that a conviction may have been obtained by the testimony of the plaintiff is one of the reasons given for excluding proof of it in a civil action where the plaintiff cannot testify. *Quinn v. Quinn*, 16 Vt. 426; *Robinson v. Wilson*, 22 Vt. 35; *State v. Cazeaux*, 8 Mart. 318: 13 Am. Dec. 288. A difference of requirement regarding the instruments of proof is equally controlling where both cases are civil. Steph. Dig. Ev., Art. 41, (d.) We see no reason why this distinction should not be recognized when both cases are criminal. Whatever the amount of evidence ordinarily adduced, there is no rule that requires more than the evidence of a single witness in criminal cases generally. There can be no conviction of perjury on the uncorroborated testimony of a single witness. An application of the rule in cases like this might result in convictions upon less evidence than the law requires. This serves to distinguish cases of perjury from criminal cases generally, and renders the doctrine of *res judicata* inapplicable.

Exceptions sustained, judgment and sentence reversed, and cause remanded.

STATE v. JAMES M. RYDER.

Special Term at Brattleboro, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 16, 1908.

*Criminal Law—Wrongful Attempt to Produce an Abortion—
Evidence—Sufficiency—Res Gestæ—Disputed Handwriting
—Standards of Comparison—How Proved—Measure of
Proof—Exceptions—Too General.*

Declarations, otherwise inadmissible in evidence, are admissible as a part of the *res gestæ* only when they grow out of and elucidate a principal and material fact or transaction, are contemporaneous therewith, and derive some degree of credit therefrom.

In a prosecution of wrongfully attempting to produce the miscarriage of a pregnant woman, who died in consequence thereof, where the State's evidence that she burned two letters which the State claimed were written to her by the respondent was admissible for the purpose of laying the foundation for secondary evidence of their contents, her declaration, made when she burned the letters, that she was going to burn them because her sister might get hold of them, was admissible against the respondent as a part of the *res gestæ*.

The State having offered to show the pregnancy of the deceased by her declarations, the respondent said that if it was the State's purpose to connect him with it he did not object, whereupon the State said that it was its purpose subsequently to do that, and thereupon the evidence was admitted and the respondent excepted. The witness testified that the deceased told him she was pregnant, and had arranged with the respondent by mail to help her out of her predicament, and asked the witness to get her thirty-five dollars wherewith to pay the respondent. *Held*, that the exception went to the whole testimony and was too extensive to be available in respect of what the deceased told the witness about having arranged with the respondent to help her out of her predicament, since what she told him about being pregnant was

not objected to, as the State subsequently made the promised connection.

In a prosecution against a physician for wrongfully attempting to produce the miscarriage of a pregnant woman, who died in consequence thereof, evidence considered and *held* that it tended to show that the respondent wrote a certain letter destroyed by the deceased and signed "Doc," in which the writer made an appointment with her "to remove that tumor for you."

Standards of comparison by which to test the genuineness of handwriting disputed in a criminal case may be proved by a mere preponderance of the evidence, which may consist only of the opinions of witnesses who did not see the standards written, but have seen the person in question write and claim to be familiar with his handwriting.

A general exception to a specified portion of the charge is bad unless that portion is wholly unsound.

INFORMATION for wrongfully attempting to procure the miscarriage of a pregnant woman, who died in consequence thereof.

Plea, not guilty. Trial by jury at the April Term, 1907, Windham County, *Taylor, J.*, presiding. Verdict, guilty; and judgment thereon. The respondent excepted. The opinion states the case.

Senter & Senter for the respondent.

R. C. Bacon, State's Attorney, for the State.

The fact that the respondent testified that he wrote a letter to the deceased on the day in the afternoon of which the letter in question was seen in her possession, taken with the coincidence of his acts with the statement in the letter of what the writer would do, tends to show that the respondent wrote that letter. *Com. v. Barrows*, 176 Mass. 17; *Com. v. Bishop*, 165 Mass. 148.

The testimony of the witness that the deceased told him that she was pregnant was admissible as tending to show her then physical condition and health. *State v. Gedike*, 43 N. J. L. 86; *State v. Glass*, 5 Ore. 73; Wig. Ev. §1716. And her further statement that she had made arrangements with the respondent to help her out of her predicament, was admissible as

a part of the *res gestæ*. *State v. Howard*, 32 Vt. 380; *Solander v. People*, 2 Colo. 248; *State v. Dickinson*, 41 Wis. 299; 1 Gr. Ev. §111.

ROWELL, C. J. This is an information for the statutory crime of employing means with intent to procure the miscarriage of a pregnant woman, the same not being necessary to preserve her life, and who died in consequence thereof. The prisoner lived in Bellows Falls; the woman, in Proctorsville. The State claimed, and its evidence tended to show, that the deceased arranged with the prisoner by mail for the operation; that he sent her two letters concerning the matter, one of which she received the evening before she went to Bellows Falls to meet him; and that the next morning she burned two letters, one of which was signed "Doc," and both of which the State claimed were written by the prisoner. The witness who proved the destruction of the letters testified that when the deceased destroyed them she said she was going to burn them because her sister might get hold of them. The prisoner now objects that this is hearsay, and nothing more. But we think that the declaration was admissible as a part of the act of destroying the letters, *pars rei gestæ*, proof of their destruction being competent for the purpose of laying the foundation for secondary evidence of their contents. The declaration accompanied the act, was calculated to explain and elucidate it, and was so connected with it as to be a part of it, and to derive some degree of credit from it. In such cases the credit that the act gives to the accompanying declaration as a part of the transaction, and the tendency of the declaration to explain the act, distinguish this class of declarations from mere hearsay. Such declarations derive credit and importance as forming a part of the transaction itself, and are included in the accompanying circumstances, which may, as a rule, be given in evidence with the principal fact. But there must be a principal fact or transaction, and only such declarations are admissible as grow out of it, illustrate its character, are contemporaneous with it, and derive some degree of credit from it. *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36; *Waldele v. New York Central R. R. Co.*, 95 N. Y. 274; *New Jersey Steamboat Co. v. Brookett*, 121 U. S. 637; Steph. Dig. Ev., Chase's ed., 8, n. 3; Thayer's Prel. Treat. Ev. 521, 523.

The State offered to show the pregnancy of the deceased by her declarations. The prisoner objected that they were not evidence against him, but said if it was the purpose of the State to connect him with it, he did not object. The State said that it was its purpose to connect him with it at the other end of the journey, and thereupon the evidence was admitted, and the prisoner excepted. The witness testified that the deceased told him she was pregnant, and had arranged with the prisoner by mail to help her out of her predicament, and asked the witness to get her thirty-five dollars with which to pay him. It is contended that what the deceased told the witness about having arranged with the prisoner to help her out of her predicament, was mere narrative, and therefore inadmissible. But the exception was general, and went to the whole testimony, whereas that part of it that came strictly within the offer, namely, what the deceased said about being pregnant, was not objected to, as the State subsequently connected the prisoner as it said it would. The exception, therefore, is too large to be available.

The State offered secondary evidence of the contents of the letter signed "Doc." The prisoner objected that there was nothing to connect him with the letter. The objection was overruled, and the testimony admitted, which showed that the letter read: "Come to Bellows Falls Tuesday next on the noon train, and I will meet you at the depot. I will remove that tumor for you, and you will be able to go home on the evening train. Be sure and bring thirty-five dollars with you."

The prisoner claimed, and his testimony tended to show, that he was unacquainted with the deceased, and never saw her till the day on which, by arrangement made by mail, she was to come to his office to have an examination to ascertain what was the matter with her; that she suggested a tumor; that all he did was to make a partial examination, during which she died; that he made no attempt to procure an abortion, and did nothing to cause her death; that he wrote and mailed to her two letters, one, the day before she came to his office, and one, some days before; that he signed the first with his own name, "Mr. Ryder, M. D.," and added a postscript, which he signed "Doc." As to the contents of the second letter, he said nothing.

The State's evidence tended to show that pursuant to her arrangement with the prisoner, the deceased went to Bellows

Falls about half-past one in the afternoon of October 30, 1906, accompanied by a young woman who lived in Proctorsville; that when the train arrived at Bellows Falls, the prisoner met them at the depot with a closed carriage that he had previously engaged for that purpose, and by his direction they were taken to his office; that the prisoner soon came on foot, and thereupon gave the deceased the address of a liquor dealer in North Walpole, whither she and her friend went, and returned to the prisoner's office shortly after four o'clock with a bottle of gin, and another bottle, the contents of which did not appear; that the prisoner soon called the deceased into his office, and in about fifteen minutes thereafter she was dead from shock or air embolism.

The prisoner claims that there was no legal evidence that he had anything to do with the letter signed "Doc," and that therefore it was error to admit secondary evidence of its contents. The State claims that the circumstances shown, taken in connection with the prisoner's own testimony, were sufficient to warrant the jury in finding that he wrote the letter; and with this we quite agree.

Proving things by circumstantial evidence is a process of imperfect induction, by which, from the known we infer and find the unknown. But circumstantial evidentiary facts are too various to admit of enumeration, for they are as changeful as the events out of which they grow. They cannot be comprehended within any rule, nor brought under any classification. Great latitude is allowed in their reception, and everything that tends to connect the supposed evidentiary fact with the *factum probandum*, is admissible to prove that fact. Will's Circumst. Ev. 36, 37; *Holmes v. Goldsmith*, 147 U. S. 150, 164. Viewed in this light, there is little doubt about the sufficiency of the evidence to connect the prisoner with the letter.

The prisoner introduced two letters addressed to him, which his evidence tended to show were written by the deceased. The State denied that she wrote them, and claimed that the prisoner fabricated them. To sustain this, the State produced several letters, and introduced the testimony of witnesses who said they had seen the deceased write, knew her handwriting, and that the letters produced were in her handwriting. Thereupon the State offered them in evidence as standards of comparison by which

to test the genuineness of the letters introduced by the prisoner. The court found that they were sufficiently proved to be used as standards, and admitted them as such, but, as it would seem, left the ultimate question of their authenticity for the jury. The prisoner excepted, and the only question now made under the exception is as to the kind and character of the evidence by which the standards were proved, it being contended that it was not sufficiently clear, direct, and positive; that they should have been proved by witnesses who saw them written, and established beyond a reasonable doubt; whereas they were proved only by the opinions of witnesses who had seen the deceased write, and claimed to be familiar with her handwriting. In *Rowell v. Fuller*, 59 Vt. 688, standards were proved as they were here, by witnesses who did not see them written. It was objected there as here that the evidence was not legally sufficient to warrant a finding of their genuineness. But the Court said it was; that any evidence pertinent to the issue was admissible; and that the question should be tried as any other issue between the parties, and by the same rules of evidence.

About a page of the printed exceptions is a recital from the charge that deals with whether the letters introduced by the prisoner were genuine or fabricated, and with what facts, if proved, would tend to show them genuine. The court then charged upon the prisoner the burden of showing their genuineness by a fair balance of the evidence. The prisoner excepted to all of the charge contained in the recital, without specifying any part of it. He now objects to none of it as erroneous except the part that placed the burden of proof upon him. And clearly none of the rest of it was erroneous; and whether the part now objected to was erroneous we do not consider, for to sustain such an exception, all of the charge recited must be faulty. This, as is said in *Cutler & Martin v. Skeels*, 69 Vt. 154, 161, has been so often decided that it is needless to cite authorities in support of it.

Judgment that there is no error in the proceedings of the County Court, and that the prisoner take nothing by his exceptions. Let sentence be imposed, and execution thereof done.

TOWN OF BROOKFIELD v. CHARLES O. BIGELOW, ET AL.

May Term, 1907.

Present: ROWELL, C. J., MUNSON, and WATSON, JJ., and TAYLOR,
Superior J.

Opinion filed January 16, 1908.

*Equity—Trust Funds—Accounting—Burden of Proof—Taxes—
Collection by Treasurer—Treasurer's Duties and Responsibility—V. S. 480-486.*

In a suit in chancery by a town for an accounting and for the recovery of trust funds alleged to be held by defendant as its treasurer, the burden of establishing the amount for which defendant should account is on the orator, and the burden of accounting therefor is on defendant.

Where a municipality collects its taxes through its treasurer, under V. S. 480-486, such treasurer, in the absence of any breach of duty on his part, is chargeable only with money he has actually received.

Under that system of collecting taxes, payments of taxes to the treasurer are voluntary, and he receives such payments merely as he receives money of the town from any other source.

After such treasurer delivers the delinquent tax bills to the collector, the whole responsibility of collecting rests on the latter; and the only duty in the premises thereafter devolving on the treasurer is to receive and account for any money paid him by the collector.

APPEAL IN CHANCERY, Orange County. Heard at Chambers, September 26, 1906, on the pleadings and master's report, Tyler, Chancellor. Decree, that the bill be dismissed with costs to the defendants. The orator appealed. The opinion fully states the case.

John W. Gordon and W. B. C. Stickney for the orator.

The treasurer should account for all taxes collected by the collector, and show abatements or some other disposition of the delinquent taxes. *State v. Powell*, 40 La. Ann. 234; *Police Jury v. Brookshier*, 31 La. Ann. 736; *State v. Guilbeau*, 37 La. Ann. 718; *Vermillion v. Comeau*, 10 La. Ann. 695; *Scarborough v. Stevens*, 3 Rob. (La.) 147; *Fake v. Whipple*, 39 N. Y. 394; *State v. Lott*, 69 Ala. 147; *Timberlake v. Brewer*, 59 Ala. 108.

Analogous to the above cases are the cases holding that when the collector is sued for failure to account, it is no defence that the moneys have been stolen from him without fault or negligence on his part. *Cooley*, Taxation, 711; *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 How. 154; *U. S. v. Dashil*, 4 Wall. 182; *Morbeck v. State*, 28 Ind. 86; *Mazzy v. Shattuck*, 1 Denio 233.

The annual statement of the auditors has no effect on this case. *State v. Bates*, 36 Vt. 387-398; *Cooley*, Taxation, 716. Nor did such settlement with the auditors have the effect to start the running of the Statute of Limitation. *Kimball v. Ives*, 17 Vt. 430; *Bigelow v. Catlin*, 50 Vt. 408; *Drake v. Wild*, 65 Vt. 611; *Everts v. Nason's Est.*, 11 Vt. 122; *Paine v. Hathaway*, 3 Vt. 212; *Sparhawk et al. v. Buel*, *Admr.*, 9 Vt. 41; *State Treas. v. Weeks*, 4 Vt. 220; *Miles v. Thorn*, 99 Am. Dec. 385.

"As a general rule doubtless the length of time is no bar to clearly establish expressed trusts which are not within the Statute of Limitations because the possession of the trustee is presumed to be the possession of his *cestui que trust*." *Speidell et al. v. Henrici*, 120 U. S. 377; *Hovenden v. Lord Arnesley*, 2 Sch. & Lef. 307; *Kane v. Bloodgood*, 11 Am. Dec. 430; *Prevost v. Gratz*, 6 Wheat. 481; *Lewis v. Hawkins*, 90 U. S. 119; *R. R. Co. v. Durant*, 95 U. S. 576.

Harvey, Harvey and Harvey, and *Darling & Darling* for the defendants.

The orator cannot rely on the presumption that the selectmen made and delivered correct tax bills. The presumption that an officer has done his duty cannot be invoked for the purpose of putting another officer in default, as the presumption of the performance of official duty applies equally in favor of

each. *Weimer v. Bunbury*, 30 Mich. 201; *Supervisors v. Rees*, 34 Mich. 481.

In the absence of fraud or mistake, the auditor's report adopted by the town is final and conclusive. 27 Am. & Eng. Enc. 804.

It is no ground for relief in equity that these claims are barred by the statute law. *Burton v. Wiley*, 26 Vt. 430; *Fletcher v. Warren*, 18 Vt. 45; *Smith v. Wood*, 42 N. J. Eq. 563; *Price v. Mulford*, 107 N. Y. 309; *Carr v. Thompson*, 87 N. Y. 160; *Pierson v. McCurdy*, 33 Hun. 534; *Hughes v. Brown*, (Tenn.) 8 L. R. A. 480; *Hicht v. Slaney*, 72 Cal. 363; *Matthews v. Simmons*, 49 Ark. 468; *Newcome v. Bart. County*, 103 Ind. 526; *Rush Co. v. Slate*, 103 Ind. 497; *Butler v. Johnson*, 111 N. Y. 204; *Bickford v. Wade*, 17 Vesey Jr. 98; *Hickmond v. Gaither*, 2 Yerg. 200; *Elmendorf v. Taylor*, 23 U. S. 10; *Smith v. Clay*, 3 Bro. Ch. 640; *Callord v. Tuttle*, 4 Vt. 491; *Thorp v. Thorp*, 15 Vt. 105; *Spear v. Newell*, 13 Vt. 288; *Wells v. Morse*, 11 Vt. 9.

TAYLOR, Superior Judge. The orator brings its bill of complaint for an accounting and the recovery of trust funds alleged to be held by the defendant Bigelow as treasurer of the orator. The defendant Bigelow held the office of treasurer by successive elections from 1889 to 1904 and the other defendants are sureties on his official bonds for the several years during Mr. Bigelow's term of office. The cause was heard below on the pleadings and master's report and is here on appeal from the decree of the chancellor dismissing the bill.

Of the several claims urged below only two are insisted upon in argument.

It is contended that defendant Bigelow should be decreed to account for certain taxes claimed to have been placed in his hands as treasurer for collection in the years 1893, 1894, 1895 and 1896, aggregating \$683.35. As his liability to account therefor depends in each case upon the same rule of law, we can treat this claim in the aggregate.

It appears from the master's report that during the time Mr. Bigelow was treasurer the taxes in the town of Brookfield were collected by the treasurer. While the master does not find the fact in terms, it is fairly inferable from his report that the method of collecting taxes during the years in question was that

provided for in sections 480 to 486 of the Vermont Statutes, (P. S. 619-624), relating to the collection of taxes by the treasurer. The orator claims that defendant Bigelow is chargeable to the above named amount in excess of the taxes for which he has accounted in the years in question, and arrives at this item by charging the treasurer with the amount derived each year by multiplying the grand list of that year by the rate per cent. voted and crediting him with the amount accounted for by him. It claims that these sums should have been received by the treasurer and accounted for in his settlement with the town.

There appears to be a discrepancy or shortage when the account is stated in this manner. The master reports that he is at a loss to understand how this apparent discrepancy can be explained. The original rate bills for the years in question are not in existence, having been destroyed by Mr. Bigelow. It appears that about once in three years during his term of office as treasurer Mr. Bigelow destroyed the cancelled orders, the stub order books of the selectmen and the rate bills for the collection of taxes, after they had been examined by the auditors of the town, under the belief that he had a right to do so and with no thought of anything wrong in so doing. The auditors annually in the month of February audited the accounts of the treasurer. At such audits they had the grand list books, the various tax-rate bills, the treasurer's books and his vouchers for disbursements. The master finds that the auditors carefully examined and verified the treasurer's accounts each year and prepared a report, including a statement of the treasurer's accounts, which was printed and distributed among the voters of the town prior to the annual meeting, which report was, by vote, accepted by the town and spread upon the records.

The master further reports that there was no evidence before him as to the exact amount of the rate bills committed to the treasurer for collection by the selectmen, and no evidence as to the amount of taxes actually collected, except the amounts conceded by him as having been received; and finds, if as a matter of law, the treasurer can in this proceeding be charged with the full amount of the taxes for the years in question, as claimed by the orator, without evidence to show that he has actually collected the same, that it is entitled to recover for each of the respective fiscal years sums aggregating the sum of \$683.35,

together with such interest as the court may allow; but, if to warrant recovery in this action the orator must show that the taxes it claims to recover were actually received by the defendant Bigelow, it has failed so to show, and is not entitled to recover the same or any part thereof.

The orator contends that in this proceeding the burden of accounting is upon the defendant and that he should account for the full amount of the rate bills committed to him for collection. The burden of accounting for the moneys shown to be in his hands as treasurer is upon the defendant. The burden of establishing the amount to be accounted for is upon the orator. The master in effect finds that the amount of the tax bills for the years in question placed in the defendant's hands for collection was as claimed by the orator, but fails to find that the taxes it claims to recover were actually received by the defendant. The allegations of the bill do not raise the question of the orator's right to recover on account of the defendant's breach of duty in not collecting the taxes in dispute. The question then presented is, must the defendant Bigelow account for the amount of the tax bills committed to him for collection as treasurer in excess of the moneys actually received by him? or, in other words, does the law require the treasurer of a town in whose hands a tax bill is placed for collection under our statute to account for the full amount thereof?

We hold that such is not his duty under our statute. The statute provides what the treasurer shall do, but does not make him chargeable with anything in excess of the sums actually received by him, certainly in the absence of any shortage of duty on his part. When a town votes to collect its taxes by the treasurer the selectmen are required to make the tax bill and deliver it to him. Thereupon the treasurer is required to give notice in the manner prescribed in the statute calling upon the tax payers to pay their respective taxes within ninety days from the date of such notice. On taxes so paid a discount of four per cent. is allowed to the taxpayer. At the expiration of such ninety days the treasurer is required to make out and deliver to the collector a rate bill of the delinquent taxes with his warrant against the delinquent taxpayers. Thereafter the responsibility of collecting such taxes rests upon the collector and the only duty devolving upon the treasurer is to receive and account for

moneys paid over to him by the collector. If the collector defaults, or if taxes are permitted by the collector to outlaw, or if the town suffers in any other manner through the negligence of the collector, the treasurer is not liable to the town. Under this system, payments to the treasurer are voluntary. He has no authority to enforce collection except in case of absconding taxpayers. He receives what money the taxpayers choose to pay to him the same as he receives moneys of the town coming from any other source. He is held to account for all moneys in his hands as treasurer, but uncollected taxes cannot be treated as money in his hands, in the absence of a statute making him thus chargeable.

The cases cited by the orator in support of its contention are all cases in which a collector of taxes was a party and most, if not all, arose under a statute making the collector chargeable with the full amount of the tax bill placed in his hands for collection, subject to such abatements and allowances as the law gives him; so they are not authority in this case.

The court below properly disallowed the orator's claim for taxes.

The remaining question is one of costs. The court below awarded costs to the defendant. Costs in chancery are largely in the discretion of that court, dependent upon the circumstances of each case. This Court rarely disturbs a decree in chancery on the question of costs alone. It is done only in exceptional cases, and no sufficient reason appears in this case to make it exceptional.

Decree affirmed and cause remanded.

MICHAEL QUINN v. WILLIAM H. VALIQUETTE.

Special Term at Rutland, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 16, 1908.

Equity Pleading—Construction—Information and Belief—Conclusions—Fraud—Allegations of Fact and Evidence—Landlord and Tenant—Lease—Extensions—Difference Between Covenant for Renewal of Lease and Extension of Term—Equity—Quieting Title—Entertainment of Suit—Discretion of Court—Remedy at Law.

A bill in chancery does not sufficiently charge that a transaction is fraudulent by merely characterizing it as fraudulent, without alleging that which makes it such.

A demurrer to a bill in chancery does not admit what the bill merely alleges the orator is informed and believes.

Nothing can work an equitable estoppel, unless it appears that it was relied upon.

In order that a person be estopped by an inquiry as to his right or interest in property, it must appear that he knew the purpose of the inquiry, whether the person making the inquiry had such an interest as entitled him to make it, and that the answer would be relied upon.

On demurrer to a bill in chancery, an extension of a lease purporting to have been executed March 15, and acknowledged March 16, there being no allegation that it was not executed when it purports to have been, cannot be taken to have been executed after the adjudication of insanity of the lessors, which was on March 26, though the bill alleges that, in answer to a letter of inquiry, a letter, dated March 28, was received from defendant to the effect that an agreement for a new lease had not then been signed, the letter so pleaded being only evidence and so not admitted by the demurrer.

There is a material difference between a covenant for the renewal of a lease and one for an extension of the term at the option of the

lessee. The former is a mere executory contract for a lease thereafter to be executed. The latter makes the lease, at the option of the lessee, a present demise for the combined periods of the term certain and its agreed extension.

Where a lease for ten years provides for an extension of the term for ten years at the option of the lessee, it amounts to a lease for twenty years, at the option of the lessee, and his mere holding over after the expiration of the first ten years is a sufficient exercise of that option; so that it is immaterial whether the lessors were insane when they later gave the lessee a written extension for ten years.

The rule for the construction of equity pleadings is, that their language shall be understood according to its natural import in connection with the subject-matter; that in equipoise the construction is to be against the pleader; and that no intendments are to be made in favor of the pleader that do not naturally result from the facts alleged.

Under the above rule, on demurrer to a bill in chancery to set aside an extension of a lease for that the lessors were insane when they executed the extension, the lease will be taken to have provided for an extension of the term, rather than a renewal of the lease; the bill alleging only that on March 26, 1906, when the lessors were adjudged insane and their guardian appointed, defendant lessee was in possession of the premises after expiration of the original lease, and had not vacated them nor surrendered possession to the lessors; that defendant was then occupying them as a hotel, and continued so to occupy them by a manager, servants, and agents; that orator bargained for the premises in the following October, before which he made inquiry thereon and learned that defendant had held over under the lease, and was paying rent by the month; that a written extension, dated March 15, 1906, was in the words, "we hereby agree to extend the within lease for a further term of ten years from Jan. 1, 1906, to Jan. 1, 1916"; that such writing purports to be an extension of an original lease duly recorded; and that the orator understands that it is written on the lease to defendant terminating January 1, 1906.

Possession of real estate is notice to the world of whatever title, legal or equitable, the one in possession may have.

The relation between the tenant of demised premises and the grantee of the reversion is that of landlord and tenant, with all the

rights and remedies incident to that relation, regardless of attornment; and such grantee is entitled to all rent accruing after his conveyance and not paid to his grantor in default of notice.

A bill in equity to remove a cloud from the title to real estate is addressed to the discretion of the court, which is to be governed as far as possible by general rules and principles, but still grants or withholds relief according to the circumstances of the particular case when such rules and principles furnish no certain measure of justice between the parties.

A court of equity will not entertain a suit by the grantee of demised premises to remove, as a cloud on the title, the grantors' extension of the lease, where no fraud is sufficiently alleged, and the case presented is essentially that of a landlord seeking to remove from his legal title the cloud of his tenant's lease, terminating in eight years by its own limitation, and there being no general rules and principles affording a certain measure of justice between the parties, no danger from delay, as an action at law can be commenced at once, and no other ingredient being shown that requires the effective powers of equity to prevent fraud and injustice.

APPEAL IN CHANCERY. Heard on demurrer to the bill at the March Term, 1907, Rutland County, *Waterman, J.*, presiding. Demurrer overruled; bill taken as confessed; and decree, *pro forma*, for the orator, according to the prayer of the bill, for possession of the premises in question, and for an accounting. The defendant appealed.

This is a bill in chancery to avoid and set aside an extension of a lease of the Berwick House property in the city of Rutland, for that the lessors were insane when they executed the extension.

The bill alleges that before and on February 28, 1906, Harriet L. Richardson and Fred H. Richardson, her son, were the owners of said property, a large part of which was occupied for hotel purposes; that on March 26, 1906, on application dated the 16th of said March, filed in the probate court the 19th, notice thereof having been duly served on said Richardsons, said court adjudged them insane, and mentally incapable of taking care of themselves and their property, and appointed

Homer L. Hoag of said city their guardian, who thereupon accepted the trust, and entered upon the duties thereof; that at the time of said appointment the defendant was in possession of said premises after the expiration of a written lease thereof under seal for a term of ten years, terminating on January 1, 1906, and had not vacated the same, nor surrendered possession thereof to said Richardsons, who were his lessors; that at said time the defendant operated said hotel property, and continued to operate it by a manager, servants, and agents, and spent, and still spends, a large part of his time in New York City, engaged in other business, and leaves the operation of said property in the hands of such manager, servants, and agents, without proper care and supervision, returning to the city of Rutland only occasionally.

The bill further alleges that at the time of the appointment of said guardian, and for six months or more prior thereto, the orator is advised and believes that said Richardsons were insane, and wholly incompetent to transact any business and to comprehend and understand any business transaction, and that the mother was controlled and dominated by the son, and that both were easily influenced and dominated by others, all which the defendant well knew; that immediately after his appointment, the guardian went to said premises, and interviewed the manager thereof, to ascertain as best he could the true contract, if any there was, and the claims, under which the defendant was holding possession of said premises; that being unable to get any satisfactory information upon the subject, he wrote to the defendant at New York for information, and received from him by due course of mail a letter, dated March 28, 1906, reading as follows: "Your letter of the 27th inst. is at hand. There is an agreement with Mr. Richardson as to terms of a new lease, which has not been signed, owing to the fact that it was thought best by Mr. Coolidge to wait until a guardian was appointed"; that afterwards, on the 16th of October, 1906, the guardian obtained a license to sell all of the real estate of his wards, and thereupon, on the same day, relying on said letter and such other information as he was able to get on the premises, he bargained and sold said property to the orator for a large sum of money, which he paid, and that afterwards, on the 5th day of November, 1906, the guardian executed and delivered to the orator a deed of said property, free and clear of all incumbrances

except the mortgages thereon, which the orator assumed and paid, which said deed the orator caused to be recorded the 6th day of said November; and said deed is referred to, and made a part of the bill.

The bill further alleges that before the orator bought said premises as aforesaid, seeing them occupied by the defendant, his manager and servants, he applied thereon to the servants and agents, and to the guardian, to ascertain under what agreement, contract, or claim the defendant, his servants and agents, were then possessing, occupying, and holding said premises, and that he ascertained that the defendant had held over under a lease that terminated January 1, 1906, and was paying rent therefor by the month, and that he could obtain possession thereof on a month's notice to quit, and that there was then in existence no written lease of the premises; that upon applying to the guardian, he presented to the orator the defendant's letter; and that thereupon, relying upon the representations therein, he made said purchase and paid the consideration thereof.

The bill further alleges that on the 19th of said October, at 1 o'clock and 40 minutes in the afternoon, as the orator is advised and believes, the defendant left for record at the city clerk's office in the city of Rutland, a writing, purporting to be dated March 15, 1906, and to be signed and sealed by the defendant and the Richardsons in the presence of two witnesses, and to have been acknowledged by them at said city on the 16th of said March, before a notary public, the body of which said writing is in the words and figures following: "We hereby agree to extend the within lease according to its terms for a further period of ten years from January 1, 1906, to January 1, 1916"; that said writing was duly recorded in the land records of the city of Rutland, and purports to be an extension of an original lease duly recorded in said land records, and that the orator understands that said writing is written on, and attached to, the lease between the defendant and the Richardsons, terminating January 1, 1906, and that the defendant now pretends and claims that said writing operates as an extension of the term of said lease for ten years, and claims to hold possession of said premises by virtue thereof; that said pretended extension, if the same was ever executed by the Richardsons, was procured by the defendant by fraud and undue influence, and

that the signatures thereto are not their signatures, made of their own free will, and that at the time said writing purports to have been executed, they were wholly incompetent to make a valid contract of that character, and that said writing was and is void, and ought to be set aside; that said pretended extension and said lease, together constitute an incumbrance on the title of said property, and are being used and insisted upon as a right of possession and control thereof by the defendant; that up to about the time of the record of his said deed, the orator had no knowledge nor information of said extension, nor of the claim as now made by the defendant, but relied upon the defendant's letter that there was no written extension of said lease nor completed contract in respect thereto; that on November 19, 1906, the orator notified the defendant to quit and surrender possession on January 1, 1907, which the defendant refused to do, and still holds possession; and that the orator further notified the defendant that the value to him of the use of said premises is \$800 a month, which the defendant refuses to pay.

The bill further alleges that the rent reserved in said lease is entirely inadequate for the use of said property, and that the orator is being deprived of fair and adequate returns for such use by reason of the fraudulent conduct of the defendant aforesaid; that said property is very valuable, and consists of buildings and hotel property that rapidly depreciates in value, and requires careful and adequate care, which it is not receiving at the hands of the defendant; and that by reason of the defendant's possession, the orator is prevented from using said property, and carrying on the hotel business thereon, and receiving the profits that might and would result therefrom.

The bill is demurred to for want of equity; for want of sufficient privity between the orator and the Richardsons; for want of showing that the consideration for said extension was not adequate and beneficial to the Richardsons; for want of showing fraud on the part of the defendant in procuring said extension; and for that the orator has an adequate remedy at law.

Butler & Moloney for the orator.

The guardian's deed to the orator was a repudiation of the contract of extension, if that was signed by the Richardsons; as the guardian was privy in representation, and the contract of extension voidable because of insanity. *Breckenridge v. Ormsby*, 19 Am. Dec. 71; *Jackson v. Burchin*, 14 Johns. 127; 22 Cyc. p. 1174,—1210*; *Hunt v. Robitory*, 84 Am. St. 563; *Valpey v. Rea*, 130 Mass. 384*; *Clay v. Hammond*, 93 Am. St. Rep. 147; *Hanna v. Read*, 40 Am. Rep. 608; *Hovey v. Hobson*, 89 Am. Dec. 704; *Carrier v. Sears*, 4 Allen 336.

Where one deals with a *non compos*, or a person wholly incompetent to contract or "understand the force and effect of any business transaction" the law "presumes fraud from the condition of the parties." *Sprinkle v. Wellborn*, 111 Am. St. 827; *Walker v. Winn*, 110 Am. St. Rep. 50; *Flack v. Gottscholtz & Co.*, 71 Am. Dec. 425, and note; *Lincoln v. Buckmaster*, 32 Vt. 652; *Van Deusen v. Sweet*, 51 N. Y. 378; *Hosler v. Beard*, 56 Am. St. Rep. 720.

The defendant is estopped from now claiming that the pretended extension of lease was genuine or binding when the orator has been led to believe that the agreement had not been signed, and has relied on the representation that no such contract had been signed in answer to an inquiry by the guardian. *Town of Grand Isle v. Kinney*, 70 Vt. 381; *N. E. Ins. Co. v. Haynes*, 71 Vt. 306; *Louks v. Kenniston*, 50 Vt. 116; *Green v. Smith*, 57 Vt. 268; *Earl v. Stevens*, 57 Vt. 474; *Wells v. Austin*, 59 Vt. 157; *Spiller v. Scribner*, 36 Vt. 245; *Holloran v. Whitney*, 43 Vt. 306.

O. M. Barber for the defendant.

In respect of the right to disaffirm, the law seems to be that "the grants of infants and of persons *non compos mentis* are parallel both in law and reason," and can be avoided only by such persons, or their privies in blood, and not by privies in estate. *Lincoln v. Buckmaster*, 32 Vt. 652; *Hull v. Louth* (Ind.), 58 Am. St. Rep. 405; *Mansfield v. Gordon*, 144 Mass. 168; *Austin v. Seminary*, 8 Met. 196.

The right to disaffirm is for the personal protection of the insane. 2 Page on Contracts, §899; *Riley v. Carter*, 19 L. R. A. 489; *Atwell v. Jenkins*, 163 Mass. 362; *Ingraham v. Baldwin*,

9 N. Y. 45; *Bensell v. Chancellor*, 34 Am. Dec. 561; *Allen v. Berryhill*, 1 Am. St. Rep. 309; *Ætna Life Ins. Co. v. Sellen* (Ind.), 77 Am. St. Rep. 481; *Carrier v. Sears*, 4 Allen 336.

If the deed to the orator is a disaffirmance of the contract of extension, he cannot rely on that disaffirmance, as that right is personal. 16 Am. & Eng. Enc. 629; 2 Page on Contracts, §899. The court of equity is without jurisdiction here, as an action of ejectment will give the orator a complete remedy, if he is entitled to any. 4 Pomeroy's Eq. Jur. 2753; 6 Pomeroy's Eq. Jur. 1222; *Rooney v. Soule*, 45 Vt. 303; *Munson v. Munson*, 28 Conn. 582; *Russell v. Barstow*, 144 Mass. 130; *Spofford v. Railroad Co.*, 66 Me. 51; 6 Am. & Eng. Enc. 159.

ROWELL, C. J. There is no sufficient allegation that the defendant procured the extension of the lease by fraud, for it is not enough to characterize a thing as fraudulent, without alleging that which makes it fraudulent, and there is no such allegation.

Nor is there a sufficient allegation that the defendant knew before and at the time the guardian was appointed that the Richardsons were insane; for that allegation is a part of an allegation of the orator's information and belief that they were then insane and that the orator knew it, without alleging the fact of such insanity and knowledge, based upon that information and belief. *Watkins v. Childs*, 80 Vt. 99, 106.

There is in another connection a sufficient allegation that the Richardsons were insane when they executed the extension, but there is no allegation that the defendant knew it.

No notice need be taken, as affording matter of estoppel, of what the bill alleges that the orator was informed when he inquired on the premises, for it is not alleged that he relied upon that information. But it is claimed that the defendant is estopped by his letter to the guardian from now setting up the extension of the lease as genuine and binding, since the orator was thereby led to believe that the extension had not been signed, and relied and acted upon the statement therein to that effect. But here is no estoppel, not even as to the guardian, much less as to the orator, for it is not alleged that the guardian informed the defendant of his appointment, nor of the purpose of his inquiry, nor that the defendant's answer would be relied upon, all which the defendant would have to know in order to be

estopped. *Hackett v. Callender*, 32 Vt. 97; *Durant v. Pratt*, 55 Vt. 270; *Wheeler v. Campbell*, 68 Vt. 98, 34 Atl. 35.

It is further claimed that as the defendant's letter is dated March 28, and says that the agreement for a new lease had not then been signed, it must be taken that the extension was executed after the adjudication of insanity and the appointment of the guardian, which was March 26, and that therefore the extension is void, and not merely voidable. But it can not be so taken, for the extension purports to have been executed the 15th of said March, and acknowledged the 16th, and there is no allegation that such is not the fact, unless it is contained in the defendant's letter. But that, as pleaded, is no allegation of anything, but only evidence. Hence it must be held that the extension was executed and acknowledged when it purports to have been.

But if it is to be taken that the lease provided for an extension of the term as distinguished from a renewal of the lease, it is immaterial when the written extension was executed, or whether the Richardsons were insane or not when they executed it, for then that part of the contract of the lease was executed and not executory, and made the term originally, not merely ten years, but twenty years, at the option of the defendant; and his holding over as he did was a sufficient exercise of that option, without other notice of his election, as the lease would require no other; and when he thus exercised his option, he was in as of the original term, and so the written extension would be immaterial, and there is no allegation nor claim that the Richardsons were insane when they executed the original lease.

As to how the original lease is to be taken in this regard depends on what can be gathered from the bill, from which we learn that on March 26, 1906, when the adjudication of insanity was made and the guardian appointed, the defendant was in possession of the premises after the expiration of said original lease, and had not vacated the same, nor surrendered possession thereof to the Richardsons; that at that time the defendant was occupying said premises as a hotel, and continued thus to occupy them by a manager, servants, and agents; that the orator bargained for said premises on October 16, 1906, before which, seeing them occupied by the defendant as aforesaid, he applied thereon and ascertained that the defendant had held over under said lease, and was paying rent by the month; that the language

of said written extension is, "We hereby agree to extend the within lease for a further term of ten years from Jan. 1, 1906, to Jan. 1, 1916"; that this writing purports to be an extension of an original lease duly recorded in the land records of the city of Rutland; and that the orator understands that the same is written on, and attached to, the lease between the Richardsons and the defendant, terminating January 1, 1906. This is all there is in the bill that throws light on whether the original lease provided for an extension of the term or a renewal of the lease.

The rule for the construction of equity pleadings is, that their language is to be understood according to its natural import in connection with the subject-matter; that in equipoise, the construction is to be against the pleader; and that no intendments are to be made in favor of the pleader that do not naturally result from the facts alleged. Story's Eq. Pl., Redf. ed., §452a. Construing the bill according to this rule, it must be taken that the original lease provided for an extension of the term rather than for a renewal of the lease. That there is a material difference between a covenant for a renewal of the lease and one for an extension of the term, is very generally held. But in construing such covenants, the cases differ somewhat in determining to which class they belong.

Ranlet v. Cook, 44 N. H. 512, 84 Am. Dec. 92, is a leading case on this subject. There a lease for ten years, with a proviso for renewal for ten years longer on certain terms, was held to be equivalent to extending the lease for that time, and so a sufficient lease for twenty years. The law of this case is not criticised, taking the covenant as construed; but the construction of it is criticised, as failing to note the difference in meaning between *renew* and *extend*; one meaning, to make over; to re-establish; to rebuild; the other, to prolong; to lengthen out. *Kollock v. Scribner*, 98 Wis. 104, 110. On the other hand that construction was approved in *Insurance &c. Co. v. Bank Missouri*, 71 Mo. 58. That was an action for rent. The lease, which was for a term of years, contained a covenant for the payment of double rent for every day the defendant held over after the expiration of the term, with a further covenant that after such expiration the defendant should have the privilege of renewal for a further definite term at the same rent as that reserved for the first term. The defendant held over for a number of years,

paying rent at the old rate, no new lease being executed. It was held that inasmuch as the defendant had paid the single and not the double rent, he must be taken to have held over under the covenant for renewal. It was there conceded that when the lease provides merely for an extension of the term at the option of the lessee, nothing need be done by the lessor, and that the continued occupancy of the premises and the payment of rent, constituted sufficient evidence of the lessee's election to extend the term. But it was insisted that when the lease provides for a renewal at the option of the lessee, though for a specified term and at a designated rent, there must be affirmative action by the lessor as well as by the lessee, and that while the lease for the additional term need not be written and signed, yet some new contract in relation thereto must be made by both parties before the lease can be regarded as having been renewed, and that in the absence of such express contract, the only contract existing between the parties is that which the law implies. But the court said that the defendant having continued to pay the rent provided for by the clause for renewal, he was estopped to deny that the term had been extended by that clause.

In *Kimball v. Cross*, 136 Mass. 300, the lease was for one year at such a rent, with the privilege of continuing five years at such another rent. It was contended that the latter clause was a mere executory contract for a lease thereafter to be given should the lessee desire it. But it was held that the lease was the contract under which the subsequent occupancy, at the election of the lessee, was to be enjoyed; that by it the relations and rights of the parties were defined; and that its language was apt to create a then present demise when, at the end of the first term, the occupation was continued by the tenant.

In *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392, the lease was for one year with a privilege of three years at the same rent at the option of the lessee, who covenanted to surrender at the end of the term. It was held that by remaining in possession five days after the first year, the lessee signified his election to hold for three years, and was not bound to give other notice to the lessor.

In *Harding v. Seeley*, 148 Pa. St. 20, 23 Atl. 1118, the lease was for the "term" of one year, "with the privilege of four years' additional lease" at the same rental. It was contended

that the clause, "with the privilege of four years' additional lease," was a covenant to renew the lease, and not an option for a longer or an extended term; that the nature of a covenant to renew at the option of the tenant is such as to differentiate his holding over from that of a tenant for a term certain with an option for an additional term, which requires no further conveyance. The court said that this view of the effect of a holding over after the expiration of a term certain, where the tenant has an option for an additional or further term, is generally held in this country; but construing the word "lease" in the clause in question as equivalent to *term*, the court held that by remaining in possession after the expiration of the first year, the lessee was bound for the full term of four years.

So in *Montgomery v. Board of Commissioners*, 76 Ind. 362, 40 Am. Rep. 250, it was held that a tenant under a lease for three years, with a privilege of five years at the same rate, by holding over, became bound for the full term of five years. The court said that the term did not necessarily terminate at the expiration of three years; that its termination depended upon the option of the tenant; that if the option was exercised, the term continued for five years; that there was to be no renewal, nor was there to be more than one term; that the term was either for three years or five years, depending upon the tenant, and that his option was to be exercised simply by retaining possession, and if not exercised, it was his duty to surrender possession, and not having done that, the inference that it was exercised would seem to be irresistible. This case was approved and followed in *Trestegge v. Benevolent Society*, 92 Ind. 82, 47 Am. Rep. 135.

Thus it appears that the defendant is in under a sufficient lease for twenty years not yet terminated, and does not need to rely for his tenure upon the written extension sought to be set aside.

This being determinative of the case as made by the bill, and it not appearing nor to be presumed that it can be made otherwise, though it may be if the lease in fact warrants it, it is unnecessary to consider whether the guardian's deed to the orator revoked the extension, as claimed, and if not, whether the orator, being a purchaser, is in such privity with the Richardsons as to enable him to impeach the extension on the ground of their insanity.

But the defendant says that the bill should, in any view, be dismissed for want of jurisdiction, for that as the orator has the legal title of the reversion and is out of possession and the defendant in possession, holding adversely, an action of ejectment would afford him an adequate remedy.

United States v. Wilson, 118 U. S. 86, was a bill to remove a cloud from a legal title paramount to the title of the defendant, who was keeping the Government out of possession by holding adversely. It was held that the bill could not be maintained. The court said that in such cases equity has no jurisdiction, unless its aid is required to remove obstacles that prevent a successful resort to an action of ejectment, or when, after repeated actions at law, its jurisdiction is invoked to prevent a multiplicity of suits, or there are other specific equitable grounds of relief; that bills *quia timet*, such as that was, to remove a cloud from a legal title, cannot be maintained by one not in possession, because the law gives a remedy by ejectment, which is plain, adequate, and complete, and that such is the familiar doctrine of that court.

In *Frost v. Spitley*, 121 U. S. 552, 556, it is said that under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud and to quit possession is, to protect the owner of the legal title from being disturbed in his possession or harassed by suits in regard to that title, and that the bill cannot be maintained without clear proof of both possession and legal title in the complainant. The Federal Judiciary Act of 1789, which declares that equity shall not have jurisdiction in any case where a plain, adequate, and complete remedy may be had at law, does not influence the holdings of that court on this subject, for it treats the provision as merely declaratory of the law that has governed proceedings in equity ever since their adoption by the courts of England. *Whitehead v. Shattuck*, 138 U. S. 146, where it is held that the owner of the fee, out of possession, cannot maintain a bill to remove a cloud against one in possession holding adversely. And this is the holding in most of the states where jurisdiction depends upon equity principles, unaffected by statutory provisions. Note to *Helden v. Hellen*, 45 Am. St. Rep. 375, and the cases *passim*.

But if there are specific equitable grounds of relief, the rule may be different. *United States v. Wilson*, 118 U. S. 86. Thus, it is said in *Booth v. Wiley*, 102 Ill. 84, that the rule that a bill

to quiet title and remove a cloud lies only when the complainant is in possession, or when he claims to be the owner and the land is unoccupied, applies only when the object of the bill is purely to remove a cloud from the title, and not when the primary relief sought is upon other and well established grounds of equitable relief, such as fraud, and the removal of the cloud is only an incident of that relief. In *Phillips v. Kesterson*, 154 Ill. 572, it is held that the rule has no application when a deed is sought to be set aside for fraud. But here the primary object of the bill as drawn is, not to set aside the extension for fraud, as none is sufficiently alleged, but to remove the cloud from the title.

As to what is an adequate remedy at law, we have recently said, adopting the language of the Federal Supreme Court, that "it is not enough that there is a remedy at law; that it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its administration as the remedy in equity." *Heath v. Capital Savings Bank*, 79 Vt. 301, 305, 64 Atl. 1127. But no general definition can be formulated that will be a sufficient guide in all cases, for the law must be administered and applied with reference to the circumstances of the particular case.

This brings us to a consideration of the kind and character of the cloud here sought to be removed, and to what, in the circumstances, should be the disposition of the question of jurisdiction.

The orator knew when he bought the property that the defendant was in the exclusive possession of it, and he was told that he was holding over under the lease. This put him on inquiry, and was notice to him of the defendant's title, whatever it was. *Pope v. Henry*, 24 Vt. 560, 565; *Pinney v. Fellows*, 15 Vt. 525, 541; *Wright v. Bates*, 13 Vt. 341. It is not enough that he inquired of his grantor. He should have inquired of the defendant. *Canfield v. Hard*, 58 Vt. 217, 223, 2 Atl. 136. Nor does it avail him that he saw the defendant's letter, for as it is not effective against the defendant, it cannot rebut the presumption that the law raises from his possession. *Hackett v. Callender*, 32 Vt. 97, 107. Had the orator inquired as he ought, he would have learned that the lease provided for an extension and not a renewal, and would have been charged with knowing the legal effect of holding over. So the orator took subject to

the defendant's rights, and his deed of the reversion made his title complete, for attornment was not necessary, and established between him and the defendant the relation of landlord and tenant, with all the rights and remedies incident to that relation, and entitled him to all the arrears of rent that accrued after his conveyance and not paid to his grantor in default of notice. *Pelton v. Place*, 71 Vt. 430, 46 Atl. 63; *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455; *Scaltock v. Harston*, Law Rep. 1 C. P. 106.

Thus it appears that the case as presented is essentially that of a landlord seeking to remove from his legal title the cloud of his tenant's lease, terminating in eight years by its own limitation, and which, it would seem, the orator was willing to let run if he could get more rent, for the bill alleges that he notified the defendant that the use of the premises was worth \$800 a month to him, which the defendant refused to pay.

Cases of this kind are not *strictissimi juris*, but are addressed to the discretion of the court, which is to be governed by general rules and principles as far as it can be, but which, at the same time, grants or withholds relief according to the circumstances of the particular case when those rules and principles furnish no certain measure of justice between the parties. 1 Story's Eq. Jur., Redf. ed., §§693, 742. It is said in *Wing v. Hall*, 44 Vt. 118, that "relief in such cases is granted, not as a matter of right that the party has who seeks it, but as a matter of discretion that the court may exercise or not as appears fit." There the court said it appeared fit, in the circumstances, that the parties should be left to try the facts by jury, as such questions are usually tried. This view was adopted and acted upon in *Rooney v. Soule*, 45 Vt. 303, where the court said that the discretion is to be exercised in exceptional cases, when the remedy at law is inadequate and delays dangerous, or where some other ingredient is shown requiring the effectual powers of equity jurisdiction to prevent fraud and injustice.

Now in the circumstances of this case, there are no general rules and principles that afford a certain measure of justice between the parties; there is no danger from delay, for an action at law can be commenced at once; no other ingredient is shown that requires the effective powers of equity to prevent fraud and injustice; and the orator would be no more embarrassed at law than in equity in respect of privity with the Richardsons. There-

fore we think it fit and proper to leave him to his remedy at law, unless he can amend his bill so as to cure the defects here adjudged.

Decree reversed, demurrer sustained, bill adjudged insufficient, and cause remanded, with mandate.

STATE v. G. FRED PEET.

May Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 16, 1908.

Constitutional Law—Nature and Scope of Interstate Commerce—Exclusive Control by Congress—Power of States—National Meat Inspection Law—Regulations by Secretary of Agriculture—Effect as Law—Statute Void as Regulation of Commerce—No. 182, Acts 1906—Construction of Statutes—Unconstitutional in Part—Criminal Law—Sufficiency of Information Charging Misdemeanor—Allegation of Time and Place.

General demurrers, that together challenge all the counts of a declaration by enumeration, amount to a separate demurrer to each count.

With reference to subjects of commerce that are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control; but as to subjects of commerce that are national in character and re-

quire uniformity of regulation affecting all the states alike, the power of Congress is exclusive; and its failure to regulate such commerce amounts to a declaration that it shall be free from state regulation.

That class of subjects which requires uniformity of regulation affecting all the states alike, includes the purchase, transportation, and exchange of commodities, and intercourse for the purpose of trade in any and all forms.

Articles recognized by Congress as subjects of interstate commerce must be conclusively presumed to have that status.

Whatever may be the extent of a state's police power respecting the order, morals, health or safety of its people, that power cannot be exercised over a subject committed to the exclusive control of Congress by the commerce clause of the Federal Constitution.

Since the regulations prescribed by the Secretary of Agriculture, in accordance with the requirements of the Act of Congress of June 30, 1906, "The Meat Inspection Law," exclude from interstate commerce, as too immature to yield wholesome meat, the carcasses of calves under three weeks of age, those regulations, by implication, authorize such commerce in carcasses of calves above that age, thereby recognizing them as subjects of interstate commerce; and that authorization and recognition has the force of federal law.

The purpose of a statute, whatever its language, must be determined by its natural effect.

A statute using general words will not be construed to have extra-territorial effect when to do so would render it unconstitutional, unless the words clearly indicate that intent.

So much of No. 182, Acts 1906, prohibiting the sale of diseased animals and meat, as penalizes keeping with intent to ship out of this State, for food purposes, the flesh of a calf that was less than four weeks old or weighed less than fifty pounds, dressed weight, when killed, is a direct interference with interstate commerce in violation of the commerce clause of the Federal Constitution, and void.

But the void provision is separable from the provision penalizing keeping the carcasses of such animals "with intent to sell" for food purposes,—which must be taken to mean "with intent to sell" in this State; and so the former provision may be rejected without invalidating the latter.

Where an indictment or information charges only a misdemeanor, if time and place be added to the allegation charging the first act, it will be deemed to be connected with all the subsequent allegations of fact.

INFORMATION in fourteen counts charging violations of No. 182, Acts 1906, prohibiting the sale of diseased animals and meat. Heard on demurrer to the several counts at the March Term, 1907, Chittenden County, *Hall, J.*, presiding. Demurrers overruled, *pro forma*, and information adjudged sufficient. The respondent excepted. The opinion sufficiently states the nature of the information and the scope of the demurrers.

By an Act of Congress, approved June 30, 1906, and in force at the alleged times of the committal of the offences charged in the various counts of the information, it was provided:

“That for the purpose of preventing the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce”; and that all diseased animals found on such inspection shall be set apart and slaughtered separately, etc. “And said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act, and all inspections and examinations made under this Act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this Act. * * * That the provisions of this Act requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: Provided, That if any person shall sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products

which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor, * * *: Provided also, That the Secretary of Agriculture is authorized to maintain the inspection in this Act provided for at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection then the provisions of this Act shall apply notwithstanding this exception."

V. A. Bullard and Cowles & Moulton for the respondent.

Transportation of commercial commodities from state to state is interstate commerce; and a state legislature cannot burden or restrict it. *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Robbins v. Taxing Dist.*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699; *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 31 L. ed. 790.

A state cannot prohibit the exportation of an article of commerce, though produced therein. *State ex rel. Corwin v. Ind. & Ohio etc. Co.*, 120 Ind. 576; *Mfg. Gas Co. v. Ind. Nat. Gas Co.*, 155 Ind. 545.

It is well settled that in a certain class of cases, arising under the power to regulate interstate commerce, the power of Congress is exclusive; in another class the states may regulate until Congress has acted. Congress has exclusive jurisdiction over subjects national in character, and which admit of only one uniform plan of regulation. *Gibbons v. Ogden*, 9 Wheat. 1; *A. & P. Tel. Co. v. Philadelphia*, 190 U. S. 160; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Mobile v. Kimball*, 102 U. S. 691; *Cardwell v. Am. Bridge Co.*, 113 U. S. 205. In such case, the failure of Congress to act is equivalent to a declaration that commerce shall be free and unrestricted. *Leisy v. Harding*, 135 U. S. 100; *Cooley*, Const. Lim. (6th Ed.) 595; *Cooley*, Prins. of Const. Law, (2nd Ed.) 68. Moreover, Congress has acted in this very matter. Act of Congress, June 30, 1906.

Nor can No. 182, Acts 1906, be justified as a valid exercise of the state's police power; for interstate commerce is not within the police power of a state, unless allowed by Congress. *Bowman v. C. & N. W. R. Co.*, 125 U. S. 465.

Alfred L. Sherman, State's Attorney, for the State.

Legislative acts to protect the health or morals of a community are within the police power of a state. *State v. Campbell*, 64 N. H. 422; 8 Cyc. 863; *Thorp v. Rut. & Bur. R. R. Co.*, 27 Vt. 149; *Powell v. Penn.*, 127 U. S. 78. The state has power to exclude, and it would seem to prohibit the exportation of, anything that is not an article of commerce because, as in this case, it is unwholesome. 2 Tiedman, Federal Control of Personal Property, §220; *State v. Snow*, 81 Iowa 642; *Plumley v. Massachusetts*, 155 U. S. 461; *Austin v. State*, 101 Tenn. 563; *Holden v. Hardy*, 169 U. S. 366; *State v. No. Pac. Exp. Co.*, 85 Minn. 403; *Organ v. State*, 56 Ark. 270, 19 S. W. 840; *State v. Geer*, 61 Conn. 144, 22 Atl. 1012.

There is nothing in the information that indicates that the flesh of these calves had begun to move from this State to another and that is the time when *interstate* commerce begins by the great weight if not all the decisions. The intent to ship out of the state does not make an article the subject of interstate commerce. 27 Am. St. Rep. 552; *Coe v. Errol*, 116 U. S. 517; *Kidd v. Pearson*, 128 U. S. 1; *The Daniel Ball*, 10 Wall. 557; *Turpin v. Burgess*, 117 U. S. 504; *Turner v. Maryland*, 107 U. S. 38; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Kansas v. Keibolt*, 123 U. S. 623; *U. S. v. Knight & Co.*, 156 U. S. 13; *U. S. v. Boyer*, 85 Fed. 425; *Burrows v. Delta, etc. Co.*, 106 Mich. 594.

WATSON, J. The information as amended contains fourteen counts, in Nos. 1, 3, 4, 7, 8, 9, 10, and additional counts 1, and 2, of which the respondent is charged with keeping with intent to ship out of this State, for food purposes, the flesh of calves which were less than four weeks old, and in Nos. 2, 5, and 6, of which he is charged with keeping with intent to ship out of this State, for food purposes, the flesh of calves which weighed less than fifty pounds each, dressed weight, when killed, and in Nos. 11, and 12 of which he is charged with keeping with

intent to sell, for food purposes, the flesh of calves which were less than four weeks old. The demurrers are general: one to the second, fifth, and sixth counts by enumeration, and one to all the other original counts by enumeration; and by agreement the latter demurrer is treated as in like manner covering the first and second additional counts. This in effect is the same as a separate demurrer to every count. *Darling v. Clement*, 69 Vt. 292.

The law upon which the information is based reads: "A person who sells or offers to sell or keeps with intent to sell for food purposes, or ships out of the State, or keeps with intent to ship out of this State, for food purposes, the flesh of any animal or fowl which died or was killed when diseased, or the flesh of a calf which was less than four weeks old or weighed less than fifty pounds, dressed weight, when killed, shall be imprisoned," etc. Laws of 1906, No. 182, sec. 1.

This statute is challenged as in conflict with article 1, sec. 8, of the Federal Constitution, which provides: "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." On the other hand it is contended on the part of the State that the Act, in purpose and result, is to prevent the dealing in meats, for food purposes, which are unwholesome and unfit for human consumption—hence to protect the health and morals of the community, which is within the police power of the State. It will be observed that the validity of the statute as applied to the flesh of animals and fowls which died or were killed when diseased, is not here involved. We are called upon to distinguish between the power of Congress to regulate commerce between the states and the so-called police power of the State, only with reference to those features of the statute a violation of which is charged in the information.

Although sometimes difficult of application to the case in hand, the law is well settled that when the subjects upon which the power is to be exerted are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them; yet when they are national in character and require uniformity of regulation affecting all the states alike, the power of Congress is exclusive. And the non-action of Congress is tantamount to a declaration that all commerce within its exclusive control shall remain free

from burdens imposed by state legislation. *Cooley v. Board of Wardens*, 12 How. 299, 13 L. ed. 996; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128.

It is argued that the State has power to prohibit the exportation to another state of anything which is not an article of commerce as, in this case, the flesh of calves which were less than four weeks old, or which weighed less than fifty pounds, dressed weight, when killed, because unwholesome for human food. The question then arises whether such meat, for the purpose named, is an article of interstate commerce, and whether it is within the power of a state legislature to declare it otherwise.

On July 25, 1906, for the purpose of preventing the use in interstate or foreign commerce of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, under the authority conferred upon him by the Act of Congress approved June 30, 1906, the Secretary of Agriculture issued regulations, "for the inspection, reinspection, examination, supervision, disposition, and method and manner of handling of live cattle, sheep, swine, and goats, and the carcasses and meat food products of cattle, sheep, swine, and goats, * * *."

Under Regulation 15, it is provided (X) "Carcasses of animals too immature to produce wholesome meat, all unborn and stillborn animals, also carcasses of calves, pigs, kids, and lambs under three weeks of age, shall be condemned."

Since these regulations were prescribed by the Secretary of Agriculture under authority of the Act of Congress before referred to, and are not inconsistent with the provisions of that Act, they have the force of law. *Nye v. Daniels*, 75 Vt. 81.

Under the general rule here applicable that the exclusion of one subject or thing is the inclusion of all other things, when the federal regulations excluded from use in interstate commerce, as too immature to produce wholesome meat, the carcasses of calves under three weeks of age, they by implication authorized such use to be made of the carcasses of calves above the age of exclusion, thereby recognizing them as articles of commerce; and since dressed weight is not there mentioned, it is not made a controlling element. Articles recognized by Con-

gress as subjects of interstate commerce cannot be held to be otherwise. In *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, the Court, speaking through Mr. Chief Justice Fuller, said: "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create." See also *License Cases*, 5 How. 504, 12 L. ed. 256; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224.

As has many times been held, commerce among the states comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of different states; and the power to regulate, conferred upon Congress by the commercial clause, is one without limitation. To regulate commerce is to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be subject to duties and other exactions, and how far it shall be prohibited. *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158.

The purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108. Viewed by this rule, the purpose of the statute in question, as far as it is applicable

to this branch of the case, is plain. To keep with intent to ship out of this State, for food purposes, the flesh of a calf within the specified age or weight is made criminally punishable, the natural and reasonable effect of which is to prohibit, for the purposes named, intercourse with another state for the purpose of trade in such meat. Yet that class of commerce which admits and requires uniformity of regulation, affecting all the states alike, includes the transportation, purchase, sale and exchange of commodities. Clearly by those provisions of the statute the state legislature seeks to interfere directly with the freedom of interstate commerce, which is an encroachment upon the exclusive power of Congress. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Hannibal and St. Joseph R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694; *Lake Shore & M. S. R. Co. v. Ohio, ex rel. Lawrence*, 173 U. S. 285, 43 L. ed. 702; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336; *State v. Pratt*, 59 Vt. 590; *Vt. & Can. R. R. Co. v. Cen. Vt. R. R. Co.*, 63 Vt. 1.

Some of the cases here cited will be more particularly noticed. *Brown v. Maryland* involved the constitutionality of a statute of Maryland requiring the importer of foreign articles to take out a license before he should be permitted to sell his imported goods. It was held that the right to sell was connected, as an inseparable incident, with the law permitting importation; that any penalty inflicted on the importer for selling the articles in his character of importer was in opposition to the Act of Congress authorizing importation; and that any charge on the introduction and incorporation of the articles into and with the mass of property in the country was hostile to the power given to Congress to regulate commerce. In answer to the contention that this construction of the power to regulate commerce would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory, the Court, through Mr. Chief Justice Marshall, said: "We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to

regulate commerce. * * * If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another state, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given."

In *Hannibal and St. Joseph R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, a statute of Missouri directly prohibited the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as might be diseased and such as were not, and made any person who should bring in such cattle in violation of these provisions, liable for all damages sustained on account of disease communicated by them. The suit was to recover such damages. The single question was, whether the statute was in conflict with the commerce clause of the Federal Constitution. It was held to be a plain regulation of interstate commerce; a regulation extending to prohibition; that whatever may be the power of a state over commerce which is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations; that power over one is given by the Constitution to Congress in the same words as it is given over the other, and in both cases it is necessarily exclusive.

In *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, the Court had before it the question whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein. It was held not to be within the power of a state; for to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is clearly a tax on interstate commerce itself.

In *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, the real question was, whether logs intended for exportation to another state and partly prepared for that purpose by being deposited at the place of shipment, were subject to taxation like other property in the state. It was held that the logs were not exports, nor in process of exportation, until they were committed to the common carrier for transportation out of the state to the state of their destination or had started on their ultimate passage to that state; that until then it was reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property there and liable to taxation, if not taxed by reason of their being intended for exportation. The Court, through Mr. Justice Bradley, said: "Of course they cannot be taxed *as* exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided—*Woodruff v. Parham*, 8 Wall. 123, [75 U. S. bk. 19 L. ed. 382]—that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one state to another, it cannot be doubted that such an imposition would be a regulation of commerce among the states and, therefore, void as an invasion of the exclusive power of Congress."

In *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, the plaintiff in error was convicted in the state court for a violation of an ordinance requiring a license fee from persons engaged in selling and delivering picture frames or pictures. As an employee of a foreign corporation of Illinois, he went to the State of North Carolina for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the corporation, who had preceded him there. The sender of the goods in the former State was the consignee in the latter. The court of last resort in North Carolina, affirming the conviction in the lower court, put its decision on the ground that there was a distinction between a case where the goods were shipped by the seller in one state direct to the purchasers in another, as in *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, where it was held that the tax im-

posed was upon interstate commerce, and a case where the goods were not shipped direct to the purchasers, but to the vendor, and by his agent then delivered to the purchasers. It was held by the Federal Supreme Court that this difference did not deprive the transaction of its character as interstate commerce. Mr. Justice Shiras, speaking for the Court, said: "It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate."

Moreover, the statutory provisions under consideration are not within the police power of the State. Whatever may be the extent of that power respecting domestic order, morals, health, and safety, it cannot be exercised over a subject confided exclusively to the commercial power of Congress. *Hannibal and St. Joseph R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527. To the same effect is the case of *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 23 L. ed. 543. There the Court, speaking through Mr. Justice Miller, said it was clear, from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states.

We hold, therefore, that so much of the Act of 1906 as makes it punishable to keep with intent to ship out of this State, for food purposes, the flesh of a calf which was less than four weeks old or weighed less than fifty pounds, dressed weight, when killed, is in conflict with the commerce clause of the Constitution of the United States and void. It follows that all counts in the information are insufficient, except the 11th and 12th which will now be considered.

These two counts are for keeping with intent to sell for food purposes the flesh of a number of calves less than four weeks old. The statute does not say "with intent to sell" in this State, but only "with intent to sell for food purposes,"

without saying where. The counts follow the statute in this regard. No contention is made but that the State has full and exclusive control over its purely domestic commerce; and the line of distinction between such commerce and that which is protected by the commerce clause of the Federal Constitution, we have no occasion now to consider.

The respondent says that if the statute read, "with intent to sell in this State," no question could be made; but that, taking this part of the statute in connection with the prohibition of shipping out of the State, it is clear that the sale anywhere, whether within or without the State, is forbidden, and that therefore the cases applicable to the other branch of the case are controlling here. But the statute is to be construed as not intended to have extra-territorial effect, but only an intra-territorial effect. This is the rule for construing statutes in this respect which use general words, unless they clearly indicate a different intent, which this statute does not. *In re Hickok's Est.*, 78 Vt. 259; *Colquhoun v. Heddon*, L. R. 25 Q. B. D. 129; Black, Int. Laws, 91; 2 Suth. Stat. Const. 2d ed., sec. 573. The statute means, therefore, the same as though it read, "with intent to sell in this State." As the respondent concedes that with this construction the validity of the statute in this respect cannot be questioned, it requires no further consideration.

That the statute is severable and may be held unconstitutional to the extent before indicated without invalidating that part on which these two counts are based there can be no doubt. The cases of *State v. Scampini*, 77 Vt. 92, and *State v. Abraham*, 78 Vt. 53, are full authority.

It is said, however, that these counts are bad in that the place of the intended sale is not laid within this State. The eleventh count alleges that the respondent "of Shelburne in said County of Chittenden, on the 10th day of March, 1907, did then and there keep with intent to sell," etc. The twelfth count is the same in form. Had the words "then and there" been inserted immediately following the word "intent," the allegation of time and place would have been with sufficient certainty and in the form usually adopted in allegations of connected acts. Yet in contemplation of law the allegation is so made; for when the offence charged is a misdemeanor, if time and place be added to the first act alleged it shall be deemed to be con-

nected with all the facts subsequently alleged. *State v. Scampini*, above cited.

The pro forma judgment of the county court as to all the counts, except the 11th and 12th is reversed, the demurrer sustained, and the counts adjudged insufficient. As to the 11th and 12th counts the pro forma judgment of the county court is affirmed. Cause remanded.

TYLER, J., dissents, holding that the enactment of No. 182, Acts of 1906, was within the proper exercise by the Legislature of the police power of the State.

FRANK J. HUBBARD v. RUTLAND RAILROAD COMPANY.

Special Term at Rutland, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 16, 1908.

*Personal Injuries—Trial—Issue on Concession Submitting only
Question of Damages—Effect of Failing to Object to Irrelevant
Testimony—Motion in Arrest for Defects in Verdict—
How Tested—Evidence no Part of Record.*

In an action for personal injuries, where defendant conceded the right of recovery, but denied the claim for damages, both in character and extent, in manner and form alleged, such an agreement or "special issue" was not thereby made as precluded recovery of damages which, though not specially set out in the declaration, were based on testimony received without objection; but the issue was that made by the pleadings, and the defendant by letting in the irrelevant testimony without objection, waived his right to object.

Though a motion in arrest of judgment for defects in the verdict is sustainable, it stands like a motion in arrest for defects in the pleadings, and must be tested by what appears on the face of the strict record, unaided by the evidence, which is no part of the record.

Nor is it sufficient that the matter relied on in arrest of judgment is of record, unless it is of *the* record before the court.

CASE for negligence. Defendant conceded the right of recovery, but denied the claim for damages, both in character and extent, in manner and form alleged. Trial by jury, at the June Term, 1907, Addison County, *Taylor, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

In respect of the concession the exceptions state that: "Before the jury was empaneled the defendant stated to the court, in the presence and hearing of the plaintiff's counsel, that on the trial the defendant would concede every material allegation in the declaration that would entitle the plaintiff to recover in manner and form as set forth in the declaration excepting the allegation as to the damages; and as to the damages the defendant denied the plaintiff's claim for damages both in character and extent, in manner and form as set forth in the declaration. The plaintiff, without objection, proceeded to trial and gave evidence tending to show some of the circumstances of the accident and injury sustained by the plaintiff as specially set forth in his declaration as well as evidence, not objected to, as to damages claimed to have been received to the heart, and a kidney difficulty,—showing either Bright's disease, or diabetes, or both. The defendant made no objection to the admission of the plaintiff's testimony tending to show the existence of Bright's disease or diabetes, but cross-examined plaintiff's witnesses at length upon their testimony with respect thereto given on their examination in chief, and at the close of the plaintiff's evidence the defendant introduced testimony tending to dispute the plaintiff's evidence as to the existence of such disease or diseases, and as to the seriousness and permanency of the plaintiff's condition in that respect." The declaration says nothing about injury to the heart, nor about kidney difficulty, nor about either Bright's disease or diabetes. The court submitted to the jury plaintiff's claim, on the evidence, "that he is suffering from some trouble

of the kidneys, or kindred trouble of greater or less gravity, and that he has some difficulty with his heart."

H. Henry Powers and P. M. Meldon for the defendant.

When plaintiff went to trial on defendant's concession, he thereby agreed that no damages could be claimed except those specially set out in the declaration. The verdict then went outside the issue and embraces damages not sued for. Gould Pl. Ch. 3, §168.

It was error to deny the motion in arrest. A motion in arrest will lie for defects in the verdict. Gould Pl. Ch. 10, §§9, 10, 55, 56, 58. It is not questioned that in all cases where the motion in arrest goes to defects in the pleadings an inspection of the record alone is to govern, and the evidence cannot be looked into. But it is contended that in cases where the motion goes to defects in the *verdict*, the rule is different. The verdict is part of the record, but any defect in it is not apparent upon its face. The verdict is not a pleading and if a motion in arrest will lie for defects in it, of necessity it must be looked into to discover such defects. This necessitates an examination of the evidence upon which it rests.

Davis & Russell for the plaintiff.

A motion to set aside a verdict upon the ground that it is excessive raises the question of whether it is the result of passion and prejudice. *Hovey v. Brown*, 59 N. H. 114; *Merrill v. Perkins*, 61 N. H. 262; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Wabash Ry. Co. v. McDonald*, 107 U. S. 456; *Lincoln v. Power*, 151 U. S. 436; *Benton v. Collins*, 47 L. R. A. 33.

A motion to set aside a verdict because of excessive damages is addressed to the discretion of the trial court. The court exercised its discretion and overruled the motion. It cannot be reviewed here. *Ranney v. R. R. Co.*, 67 Vt. 601; *Barrett v. Carr*, 75 Vt. 428; *Sartwell v. Soules*, 72 Vt. 270; *Massuco v. Tomassi*, 80 Vt. 186; *Harriman v. Richardson*, 48 Vt. 511; *Newton v. Brown*, 49 Vt. 16; *Sowles v. Carr*, 69 Vt. 414; *Averill v. Robinson*, 70 Vt. 161; *State v. Peach*, 70 Vt. 283; *Jangrave v. Mee*, 75 Vt. 214; *Marcy v. Parker*, 78 Vt. 87.

The alleged injuries made this testimony admissible. It was not necessary to the admission of this evidence that the parts claimed to be injured should be described with anatomical nicety. The testimony will be presumed to have been connected with testimony of the injuries claimed and alleged, since the bill of exceptions shows nothing to the contrary. *Lewis v. Crane & Sons*, 78 Vt. 216; *Manley v. D. & H. Co.*, 69 Vt. 101.

The objection that testimony was inadmissible comes too late, when made in support of a motion in arrest, or to set aside the verdict. *Davenport v. Hubbard*, 46 Vt. 200; *Hartland v. Henry*, 44 Vt. 593; *Laurent v. Vaughn*, 30 Vt. 90; *Porter v. Gile*, 44 Vt. 520; *Dunnett & Slack v. Gibson*, 78 Vt. 439; *Weed v. St. J. & L. C. R. Co.*, 66 Vt. 420.

The record considered on a motion in arrest does not include the evidence. *Montpelier & Wells River R. R. Co. v. Macchi*, 74 Vt. 403; *Baker v. Sherman & Miller*, 73 Vt. 26; *State v. Johnson*, 72 Vt. 118; *State v. Hodgson*, 66 Vt. 134; *Wait v. Starkey*, 68 Vt. 181; *Battles v. Braintree*, 14 Vt. 348; *Noyes et al. v. Parker*, 64 Vt. 379; *State v. Warner*, 69 Vt. 30; *Morgan v. Hendricks*, 80 Vt. 284; *Trow v. Thomas*, 70 Vt. 580; *State v. Burns*, 79 Vt. 272.

If this Court should find error in the rulings of the trial court subsequent to the verdict, it should remand for the correction of such errors only, and not remand generally, or for a new trial. *State v. Newell*, 71 Vt. 476; *Ranney v. Railroad Co.*, 67 Vt. 601.

ROWELL, C. J. Case for negligently injuring the plaintiff by a collision of trains, on one of which he was a passenger. Plea, the general issue, and trial by jury. Verdict and judgment for the plaintiff. The defendant conceded the right of recovery, but denied the claim for damages, both in character and extent, in manner and form alleged.

The plaintiff introduced evidence tending to show, to which the defendant did not object, that a substantial part of his damages resulting from the accident were a heart difficulty and a kidney trouble, and the damages were assessed entire.

The defendant moved to set aside the verdict, for that it included damages not sued for, and covered damages outside

the issue made in the case. As to the issue made in the case, the defendant contends that when the plaintiff went to trial on its concession, it was practically an agreement that no damages could be claimed except those specifically set out in the declaration; and this it calls "a special issue," and the issue outside of which damages were assessed. But we do not feel warranted in saying that a special issue was thus made, for the language of the concession does not imply it, nor do the exceptions indicate that such was the understanding. Therefore the issue made in the case must be taken to be the issue made by the pleadings. This being so, the defendant, by letting the testimony go in without objection, waived its right to object.

This precise question was ruled in *Davenport v. Hubbard*, 46 Vt. 200. That was assumpsit standing on the general issue. The defendant, without objection till after the testimony was closed, proved a judgment that should have been specially pleaded. The Court said that as the pleadings stood, it would have been error to receive evidence of the judgment had it been objected to; but that by allowing it to be received without objection, the plaintiff waived any objection he might have had on the ground that it was not admissible under the pleadings.

The defendant moved in arrest, for that "the verdict is largely based on facts not in issue under the declaration and concessions of the defendant made on trial and accepted by the plaintiff, and varies materially from the issue made on trial, and finds facts foreign to such issue, and is for entire damages, without discrimination between facts made material and immaterial by the issue, and is insufficient."

It is conceded that when the motion goes to defects in the pleadings, an inspection of the record alone is to govern, and that the evidence cannot be looked into. But it is contended that when the motion goes to defects in the verdict, as this motion does, the rule is different; that the verdict is a part of the record, but any defect in it is not apparent on its face; that it is not a pleading, and if a motion in arrest will lie for defects in it, it follows that it must be looked into to discover those defects, and that this necessitates an examination of the evidence upon which it rests.

That a judgment may be arrested for defects in the verdict is clear. But a motion for that purpose stands like a motion in arrest for defects in the pleadings, and like that, must be

tested by what appears on the face of the record, of which the verdict is a part. Mr. Gould says, in speaking of Lord Mansfield's disapprobation of the rule that when there are good and bad counts and a general verdict for the plaintiff for entire damages, without discriminating between the counts,—that no rule appears to be more clearly warranted by the original principles of the law than that, for the judgment, which is only an inference of law from the facts ascertained upon the record, must always be formed from the face of the record itself, and from that alone; and as the jury must be presumed to know nothing of the sufficiency or the insufficiency of counts, the conclusion seems perfectly just, in legal theory, that the damages are as likely to have been assessed in whole or in part on the bad count as on the good count. Gould's Pl. c. X, sec. 58, n. (7).

Mr. Tidd says that the only ground for arresting judgment at this day is, some matter intrinsic, appearing on the face of the record, that would render the judgment erroneous and reversible; for though it seems to have been otherwise formerly, yet it is now settled that judgment cannot be arrested for extrinsic or foreign matter not appearing on the face of the record, but that courts are to judge upon the record itself, that their successors may know the grounds of their judgment. 2 Tidd's Pr. [*918]. And this reason he got from *Sutton v. Bishop*, 4 Burr. 2283. That case, we are told by the reporter, was particularly circumstanced, long debated, and largely discussed. The question arose on a motion to set aside the verdict obtained by the plaintiff, but not fairly and regularly, as the defendant claimed. The court thought, on the whole, that the defendant was entitled to some relief, but was in doubt as to the mode in which he should receive it. It said that the verdict could not be set aside for irregularity, for it was not irregular; that there was no pretence to arrest judgment, because nothing appeared on the face of the record to justify it; that the court ought not to arrest judgments on matters not appearing on the face of the record, but should judge upon the record itself, that its successors might know the grounds of its judgment. It was agreed that *audita* would be the most appropriate method of relief, and was the old remedy, but as that had been long discussed and would be expensive, the court chose to adopt a summary way, if it could, and finally was of opinion that it might be done by

a special rule, particularizing the circumstances of the case, and upon staying execution, as such a rule would be a record of the court, and the special reasons of making it would appear in it and be on record. This case would seem to preclude the idea of any difference in trying motions in arrest for defects in the verdict and motions in arrest for defects in the pleadings, for the reason given for trying by the record at all is as applicable to one motion as to the other. Nor is it sufficient that the matter relied upon in arrest is of record, unless it is of *the* record before the court. Thus, in *Peachy v. Harrison*, 1 Salk. 77, it was held not a good exception in arrest that there was no warrant of attorney filed, though that was matter of record, and might be assigned for error; and the reason was, though it was a matter of record, yet it was not of the record before the court, but of another record.

The defendant contends, as we have seen, that if the testimony cannot be looked into when the verdict does not show the defect on its face, there can be no remedy in such a case by motion in arrest. And that is true if, as here, if anywhere, the defect appears only in the testimony, for that is not a part of the record, and the court must judge *upon* the record, and upon that alone. But the verdict being a part of the record, if the record as a whole shows the defect, it is enough. And it will show it, and must show it, if it is a defect that the law recognizes as ground for a motion in arrest. Thus, if the verdict varies substantially from the issue, as if, instead of finding the matter in issue, the jury finds something foreign to the issue, the judgment must be arrested, for the court cannot tell for which party judgment should be rendered. Here the verdict does not show the defect on its face, but taken with the rest of the record, which shows what the issue was, the record as a whole shows the defect on *its* face. The same is true when the verdict finds only part of the matter in issue, omitting to find either way another material part. These instances are sufficient to show how defects in a verdict not apparent on its face are made to appear for the purposes of a motion in arrest.

Judgment affirmed.

IN RE HARRIET C. PECK'S ESTATE.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 16, 1908.

Wills—Wife's Testamentary Capacity—At Common Law—Under Our Statutes—Election—Husband's Election Whether to Take Under Wife's Will—How Exercised—By Matter in Pais—Essentials—By Written Waiver—Requisite Action of Probate Court—Extension of Time Within Which to Waive—Discretion of Probate Court—Effect of Probate of Wife's Will on Husband's Right of Waiver—Statutes—Construction—V. S. 2543—Pleadings on Appeal from Probate Court—Formal Requisites.

The word "as" in V. S. 2543 providing that a widower may waive the provisions of his deceased wife's will "as a widow may waive the provision of her husband's will," means "in the same manner in which."

Where a wife died testate, leaving no issue, and her surviving husband, upon application to the probate court made within eight months after the will was probated, was granted an extension of time within which to elect whether to waive its provisions, and within the time thus extended he gave the probate court written notice that he elected to waive the provisions of the will and to take two thousand dollars and one-half the remainder of the estate, the waiver was exercised seasonably and in the manner prescribed by law, as it was within the discretion of the probate court to grant the extension.

At common law, a married woman was incapable of devising lands; and since that incapacity arose wholly from her status, it could not be cured by her husband's renunciation of his interest in the devise.

At common law, a married woman was, with few exceptions, incapable of bequeathing chattels, without the assent of her husband; but, as that disability arose wholly from his marital rights, such be-

quest, was valid if assented to by him, and such assent was to the particular will and continued to its probate; and the probate was conclusive both as to proper execution and the husband's assent, where that was necessary.

Where at common law a wife thus made a valid bequest of chattels with her husband's consent, it amounted to a gift from him; and though his interest in the property passed according to the will, it was not merely by force of it, nor because his consent added anything to her testamentary capacity.

Since our statute gives every married woman of age and sound mind the power to dispose of her real and personal estate, regardless of her husband's consent, neither the validity of her will nor its probate depends on such consent being shown, and, hence, the surviving husband cannot by the probate of his wife's will be estopped subsequently to elect to waive its provisions and take under the statute.

The right of a surviving husband to waive the provisions of his wife's will is not affected by either his failure to object to or appeal from the probate thereof; and any question as to whether he shall take under the will, or under the statute of descent in consequence of his waiver, is involved in the decree of distribution and should be determined in connection therewith.

The maxim, *expressio unius est exclusio alterius*, applies to V. S. 2356, providing that "the probate of a will of real or personal estate shall be conclusive of its due execution," and its conclusiveness is impliedly so limited.

Where a surviving husband seasonably filed in probate court his written waiver of the provisions of his wife's will, no action thereon by the probate court was necessary to perfect the waiver, but the same was completed and perfected by such filing, and survived the husband's subsequent death; and nothing less than such acts as, had there been no election, would have constituted an implied one to take under the will, can work an estoppel *in pais*, precluding the husband from taking in opposition to the will.

An election may be by matter *in pais* as well as by matter of record, but it can be only by plain and unequivocal acts, with full knowledge of all the circumstances, and of the party's rights, and with the intent to elect.

But when the acts of the person bound to elect between two courses do not show a choice of either to the rejection of the other, there can be no election.

In an appeal from a decision of the probate court holding inoperative the written waiver of the provisions of a wife's will seasonably filed in said court by her surviving husband, for that by his acts he had previously accepted the provisions of the will and was thereby estopped to take in opposition thereto, the admitted allegations considered and *held*, that they fail to show such estoppel.

The technical accuracy required in common law pleadings is not essential to pleadings in proceedings in county court on appeal from the decision of the probate court on a petition there presented.

APPEAL by Sayles Nichols and Gardner S. Wainwright, as executors of the will of Edward W. Peck, surviving husband of Harriet C. Peck, from the decision of the probate court, on petition of William H. Clark, one of the legatees of the will of Harriet C. Peck, holding inoperative and void the written waiver of the provisions of the will of said Harriet C. Peck, filed in said court by her said surviving husband. Heard at the March Term, 1907, Chittenden County, *Hall, J.*, presiding, on the appellant's demurrer to the petitioner's motion,—consisting of a motion to dismiss the waiver proceedings, combined with allegations in the nature of a plea in abatement thereof; on the petitioner's demurrer to the third section of the appellants' "answer" to his petition; and on the petitioner's objection, made in probate court, to the order of that court allowing said Edward W. Peck an extension of time within which to elect whether to take under his wife's said will. Motion to dismiss the waiver proceedings overruled, *pro forma*; the matter alleged in abatement, as aforesaid, adjudged insufficient; demurrer to the third section of appellants' "answer" overruled, and that section adjudged sufficient; petitioner's objection to the order of the probate court allowing Edward W. Peck said extension of time, overruled, *pro forma*; and judgment that the petition be dismissed with costs, that the waiver be sustained, and that the estate be distributed according to law. To said rulings and judgment the petitioner excepted. The appellants are also the executors of the will of Harriet C. Peck. Besides the alle-

gations of the third section of the appellants' "answer" that are recited in the opinion, that section, having reference to *Jed P. Clark et al. v. Harriet C. Peck's Exrs. et al.*, 79 Vt. 275, alleged that on January 4, 1905, and after Edward W. Peck had filed the waiver in question, Jed P. Clark, Joseph E. Clark, Irene W. A. Clark, Irene Clark Odlin and Dora Odlin, legatees under said Harriet C. Peck's will, brought their bill of complaint to the court of chancery within and for the county of Chittenden, against said Edward W. Peck, the appellants, as executors of the will of said Harriet C., and against said William H. Clark and all others named as legatees, devisees, or beneficiaries in said will, except said orators; that in that suit, and on January 10, 1905, an injunction issued against said Edward W. Peck, enjoining him, his servants, agents, and attorneys, from using any part of the principal fund of the assets of the estate of said Harriet C. Peck for his personal advantage or living expenses, and containing other prohibitions, to be operative until further order of court; that said injunction was granted within less than a year after the probate of the will of said Harriet C., which was on February 1, 1904; that said bill in chancery, among other things, prayed for an injunction against the judge of probate for the District of Chittenden, where the waiver in question was filed, forbidding his taking any action on account of said waiver, and also for an injunction against said Edward W. forbidding him to prosecute said waiver till further order of court; that these appellants and said Edward W. were advised that, pending said litigation, it would be improper for them, or either of them, to do or attempt anything in the matter of said waiver, and in consequence of said advice they did nothing; that said Edward Peck deceased June 26, 1906, and before the announcement of the decision in said chancery litigation, and that during his life, in consequence of the waiver and of said injunction; the executors, acting under the advice of counsel and to protect themselves and the estate, and at the request of said Edward W. Peck in order that nothing might be done inconsistent with his said waiver of the provisions of his wife's will, kept a true and accurate account of the dealings between her estate and said Edward W. from January 1, 1904, to June 26, 1906, the date of his decease, charging him with cash advanced and with the use of the residence of his said wife, and of her furniture, carriages, and horses, and

other privileges and appurtenances of the homestead, and, in view of the injunction, crediting him with cash refunded to the estate by him, at the end of each of the years 1904 and 1905, on account of advancements to him in excess of the net income of the estate; that the balance was struck at the end of each year and no repayment is credited for the year 1906, that balance not having been adjusted because Edward died in the middle of the year. The opinion otherwise fully states the case.

C. S. Palmer for the petitioner.

The waiver should have been made within twenty days after its probate. V. S. 2584. The rights of a husband to the property of his wife have always stood upon a different basis than the rights of a woman to her husband's estate. At common law the wife could make no will. The next step was that by statute she could make a will by her husband's consent, and the consent of the husband was held to be given as a matter of law by his allowing the probate of her will without contest, and by allowing the probate he could not thereafter make any claim adverse to the will. This principle of the common law has never been changed. The right of a married woman to-day to will away her property when she dies without issue is subject to the husband's consent. If he does not consent he waives her will and takes his statutory right, but if the husband allows the will of his wife to be probated he thereby consents and cannot thereafter revoke his consent thus formally given. *In re Polly Carey's Est.*, 49 Vt. 236.

It is apparent from No. 45, Acts 1906, that Mr. Peck must waive his wife's will in order to gain for himself the advantages thereunder. So far as this statute shows on its face, one of three things must be true. First, either that there is no time limit fixed within which Mr. Peck must fulfill the statutory requirement and waive the will, and that therefore he is to be allowed a reasonable time within which to perfect his waiver. Second, that there is some general provision of law fixing the period of time within which Mr. Peck must make his waiver; or, third, there is some specific provision applying to this particular act fixing the time. The first of these propositions, to wit, that of a reasonable time, cannot be true if there are any

provisions of statute law which would make either the second or third proposition true. V. S. 2584, is a general provision covering this point, therefore the proposition of reasonable time can be at once dismissed. Considering the second proposition we find that under V. S. 2584, any order, sentence, or decree of the probate court is final unless appealed from within twenty days, and we have at once the suggested condition of a general time limit fixed by law. If this act of probating Mrs. Peck's will, issuance of letters testamentary, etc., are in any sense an order, sentence or decree of the probate court, then it must stand absolutely and irrevocable and no act of any person can reopen the matter, nor can any act thereafter be done to prevent the operation of Mrs. Peck's will upon her property unless by appropriation of law, to wit, dower and curtesy, or change of conditions. The third contention is that of Mr. Peck, that he is on the same basis in taking two thousand dollars and one-half the estate as if he were to take curtesy in his wife's real estate, and has the same period of time within which to exercise it. We think his proposition is entirely fallacious. If Mr. Peck took curtesy he takes that portion of the estate by operation of law. *Dummerston v. Newfane*, 37 Vt. 9; *Johnson v. Johnson*, 41 Vt. 467.

If Mr. Peck is to take his two thousand dollars and one-half the remainder of the estate, he takes not by appropriation of law but by descent as an heir. *Harrington v. Harrington's Est.*, 53 Vt. 649; *Sawyer v. Heirs of Sawyer*, 28 Vt. 249.

The death of Edward W. Peck abated the waiver proceeding, and no rights acquired by him through filing the written waiver would survive to his executors. *Fales v. Stone*, 9 Met. 316; *Ferrin v. Kenney*, 10 Met. 294; *Sherman v. Newton*, 6 Gray 307; *Brigham v. Hunt*, 152 Mass. 257; *Tuck v. Fitts*, 18 N. H. 171; 1 Cyc. 70; *Reade v. Hatch*, 19 Pick. 47; *Winhall v. Sawyer's Est.*, 45 Vt. 466; *Barrett v. Copeland*, 20 Vt. 244; *Wentworth v. Wentworth*, 12 Vt. 244.

Edward W. Peck, after the death of his wife, accepted the use, income, management, and possession of all the property of which she died seized, exactly as she provided for him by her will. His relation to her property thus indicated, continued to the time of his death. This constituted an election on his part to accept such life estate, by which he estopped himself from electing any further right by waiving the provisions made for him in her will. Bigelow on Estoppel, 578; *Smith v. Guild*,

34 Me. 443; *Weeks v. Patten*, 18 Me. 42; *Benedict v. Montgomery*, 7 Watts & S. 238; *Smith v. Smith*, 14 Gray 532; *Van Dague v. Van Dague*, 14 N. J. Eq. 49; *Fulton v. Moore*, 25 Pa. 468; *Kline's Appeal*, 117 Pa. St. 139; *Snook v. Snook*, 43 N. J. Eq. 132; 1 Woerner Law of Administration, 2nd Ed. 291; 2 Williams on Executors, 772; *Leonard v. Crommelin*, 1 Edw. Ch. 208; *Hawley v. James*, 16 Wend. 143; *Delay v. Vinal*, 1 Met. 63; Redfield on the Law of Wills, Part 2, pp. 737-739-741; *Childs v. Stoddard*, 130 Mass. 110; *Watson v. Watson*, 128 Mass. 152; *Fiske v. Fiske*, 173 Mass. 413; *Drake v. Wild*, 70 Vt. 52; *Chaffee v. Chaffee*, 70 Vt. 231; *Wells Est. v. Cong. Church*, 63 Vt. 116; *In re Hiram Blackmer's Est.*, 66 Vt. 46; *Meach v. Est. of Meach*, 37 Vt. 414; *Allen v. Knowlton*, 47 Vt. 512; *Hathaway v. Hathaway*, 46 Vt. 234; *Harlandt v. Hackett*, 57 Vt. 92; *White v. White*, 68 Vt. 161.

A devise of real and personal property for life under statutes like ours puts the survivor to an election. *Herbert v. Wren*, 7 Cranch. 370; *Matter of Foster*, 76 Iowa 364; *Potter v. Worley*, 57 Iowa 66; *Howard v. Smith*, 78 Iowa 73; *Snyder v. Miller*, 67 Iowa 261; *Clark v. Clark*, 132 Ind. 25.

Hunton & Stickney for the appellants.

The plea in abatement alleges the decease of Mr. Peck, and if it be urged that the proceeding was in fact abated by the death of Mr. Peck; then the prayer of the plea is bad, for it should be not, that the "writ, declaration and pretended waiver be quashed and said waiver be dismissed," but it should be "if the court will proceed any further." *Hallowes v. Lucy*, 3 Levinz. 120, Latch. 178; *Foxwist et al. v. Tremaine*, 2 Saund. 210a; Story's Pl. 123; Comyn's Dig. H. 33, I. 12. This defect is reached by general demurrer. *Landon v. Roberts*, 20 Vt. 286, 288.

The petitioner claims that by reason of the facts, which he says exist, Mr. Peck's conduct and pretended claims constituting those facts, he in his lifetime, and his executors now, are estopped from all right to waive the provisions of the will of Harriet C. Peck. Mr. Peck's waiver was in writing. He made an express election. "An express election is made by some single, unequivocal act of the party, accompanied by language

showing his intention to elect, and the fact of his electing in a positive, unmistakable manner,—as, for example, by the execution of a written instrument declaring the election. As the election becomes fixed by such definite act, and at such precise time, no questions concerning it can arise.” Pom. Eq. Jur. §514. So far as this election can be qualified or restricted by subsequent declarations of Mr. Peck short of an absolute and express disclaimer duly executed by him, or avowed by him, it is submitted that no such declaration inconsistent with its terms can control the effect of his written waiver filed within the time limited by the court according to the statute. *Mathews v. Mathews*, 141 Mass. 511, 515.

The estoppel claimed is, of course, an equitable estoppel arising from conduct, including positive acts, spoken or written words, negative omission to do anything and silence. It is defined by Pomeroy, 2 Eq. Jr. §804, as “The effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps otherwise have existed, either of property, or contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.” An essential element is, that the party alleging it has, in reliance on the conduct complained of, been induced to act, and acted, to his prejudice. *Ibid* §812, citing *Wheelock v. Hardwick*, 48 Vt. 19: “He must have placed himself in such a situation that he would suffer a loss as the consequence of his action if the other party were allowed to repudiate the effects of his conduct.” *Holden v. Torrey*, 31 Vt. 690; *Hicks v. Cram*, 17 Vt. 449; *Deavitt, Assignee v. Hooker & Kent*, 73 Vt. 143; 69 Vt. 360; 62 Vt. 300; 79 Vt. 275; 67 Vt. 38.

The special demurrer was properly overruled. The petition of Mr. Clark is not a declaration, nor is it governed by the rules of pleading at common law. The proceeding is statutory and addressed to a court whose jurisdiction is purely statutory. It is not an adversary proceeding founded upon a matter of contract or upon alleged wrong doing, but an application addressed to the discretion of the court, asking that the waiver of Mr. E. W. Peck be dismissed for the reasons stated. *Holdridge v.*

Holdridge's Est., 53 Vt. 546; *In re Harriet Welch's Will*, 69 Vt. 127; *Hurlburt v. Miller's Est.*, 72 Vt. 110.

WATSON, J. Harriet C. Peck, a married woman, died December 25, 1903, testate. Probate of her will was granted, and Gardner S. Wainwright and Sayles Nichols, the executors named in the will, duly qualified as such. By the will the surviving husband, Edward W. Peck, was given a life estate, subject to the payment of certain annuities. Within eight months after the will was proved Edward W. made application to the probate court for an extension of time in which to elect to waive its provisions, and on hearing, the petitioner in this case and other beneficiaries under the will being there represented by their attorney, and objecting thereto, the application was granted and the time extended to the first day of January, 1905. Within the time thus extended he notified the court in writing that he had elected to waive the provisions of the will, and that therefore he was entitled by law to take the sum of two thousand dollars and one-half of the remainder of the estate, requesting that his interest in the estate be assigned and set over to him. Edward W. died June 26, 1906.

On January 23, 1907, William H. Clark filed with the probate court his petition in these proceedings, praying that a time be appointed for hearing and determining the rights of the petitioner and all others interested, and that the waiver of Edward W. be disallowed and dismissed. Some days later the petitioner also filed a motion to dismiss the waiver on the ground that the right was personal to Edward W., and that the waiver never having been determined by the court, or established as a legal right, ceased at his death. On notice to all parties interested, and after executors Nichols and Wainwright had filed their answer to the petition, the court on hearing found and adjudged that Edward W. by his acts exercised his election to take and did take of the estate under and by virtue of the terms and provisions of the will and adjudged the waiver inoperative and void, and that the estate should be administered and decreed according to the terms of the will. From this order and decree the executors appealed, and the record being filed in the county court the petitioner, pleading in abatement, prayed that the pretended waiver be disallowed and dismissed because of the

death of Edward W. before any hearing, order, or decree was had thereon. To this plea and to the motion to dismiss the waiver, filed in the probate court, the executors demurred. The objection made in the probate court to the order extending the time in which to make election, was overruled *pro forma*, as was the motion to dismiss the waiver; the demurrers to the motion to dismiss and to the so-called plea in abatement were sustained and the plea adjudged insufficient. The questions raised by exceptions to these several rulings are before us for consideration.

Three substantive points are stated by the petitioner as presented by the record: (1) Had Edward W. the statutory right to the extension of time granted him in which to make his election? (2) On his death did the right of waiver survive? (3) Did he by his acts accept the provisions of the will and thereby estop himself from taking under the statute by force of his waiver? The first two of these questions arise on the exceptions stated above and will be considered in their order.

That Edward W. had the right to make such waiver, if seasonably exercised, there can be no question. Whether he was precluded from taking the benefits resulting therefrom is another thing, a question to be considered on exceptions stated later.

It is contended that the waiver was not seasonably made. Section 2543 of Vermont Statutes reads: "If a married woman dies, leaving no issue, but leaving a will, her husband may waive its provisions as a widow may waive the provisions of her husband's will." One definition of the word *as* is, "In the same manner with or in which." Webster's International Dictionary. In this sense it is used in that section, the law having the same meaning as though it read, her husband may waive its provisions in the same manner in which a widow may waive the provisions of her husband's will. The question then is, In what manner may a widow waive the provisions of the will of her husband? By V. S. 2419 when the widow waives the provisions made for her in the will of her husband, in case he dies without issue, she may take estate as is now provided in like cases of intestate estates. By Laws of 1896, No. 45, sec. 1, real and personal estate of a deceased person, not lawfully disposed of by will, and not otherwise appropriated and distributed in pursuance of law, shall descend: "If the deceased is a married

person and leaves no issue the surviving husband or wife, as the case may be, * * *, if either waives the provisions of the will of the other, shall be entitled to the whole of the deceased's estate forever, if it does not exceed two thousand dollars. But if it exceeds that sum, then the survivor shall be entitled to two thousand dollars and one-half of the remainder." And by Laws of 1896, No. 44, sec. 5, in amendment of V. S. 2532, "The widow may be barred of such one-third part of the lands of her husband in the following ways: * * * Second, where her husband by his last will and testament made provision for such widow, which, in the judgment of the probate court, was intended to be in lieu of said one-third or her dower interest in said estate. * * * But the widow may, within eight months after the will of her husband is proved, or after letters of administration are granted on his estate, or in such further time as the court in its discretion allows, waive * * * the provisions made for her by the will of her husband, * * * and notify the court of her election in writing; and the court shall thereupon order said one-third set out as in other cases."

Notwithstanding the section last quoted did not contain all the statutory provisions touching the widow's right to waive her husband's will, it contained the only provisions prescribing the mode or manner of exercising that right; and in this respect it was by the law, giving the husband the right of waiver,—V. S. 2543, recited above,—made applicable to him as well. We hold therefore that the right of waiver in question was exercised in the manner provided by law; that it was within the discretionary power of the probate court to allow further time to the surviving husband in which to make his election; and since it was made within the extension of time granted, it was seasonably done. *Hathaway v. Hathaway*, 44 Vt. 658.

It is urged, however, that under the law by which a husband takes two thousand dollars and one-half of the remainder of his wife's estate in case she dies intestate and without issue, he takes by descent as heir; and that when she dies testate if he would waive the will and take of her estate in the same way, he must file his waiver, and appeal from the decree establishing the will within the time allowed therefor, otherwise he, as all others, is bound by the decree, and the will operates absolutely on all the property of the estate. This argument is based on what is claimed to be the force of the common law: that when

the will of a femme covert is offered for probate the surviving husband is put to his election; that he must protest against its probate or he is bound by its provisions. And it is contended that this is the waiver contemplated by No. 45 of the Laws of 1896. But an examination of the law touching the subject shows the fallacy of this position.

At common law a married woman was utterly incapable of devising lands,—*In re Polly Carey's Estate*, 49 Vt. 236,—and since this incapacity did not arise from any interest of the husband in her property, it could not be cured by his renunciation of interest. *Dye v. Dye*, 13 Q. B. D. 147. Also with some exceptions not material here, she lacked ability to make a valid testamentary disposition of chattels without the assent of her husband. But this disability arose by virtue of the husband's marital rights, and her testament could have force only because assented to by him, and to be operative the consent must be to the particular will and continue to the probate. The question was not whether he protested against the will, but whether he consented to it; and the probate was conclusive not only as to its proper execution, but as to the husband's assent also, where such assent was necessary to give the will effect. Yet then it amounted to a gift from the husband, and his interest in the property thereby passed according to the will, but not merely by force of it, nor because his consent added anything to her testamentary ability. *In re Polly Carey's Estate*, 49 Vt. 236; *Morton v. Onion*, 45 Vt. 145; *Fisher v. Kimball*, 17 Vt. 323; *Cutler v. Butler*, 5 Fost. 343; *Hodsdon v. Lloyd*, 2 Bro. Ch. 534; *Ex Parte Fane*, 16 Sim. 416, 39 Eng. Ch. 406, Am. Ed.; 1 Williams Exrs. 7th Am. Ed. *46; *George v. Bussing*, 15 B. Mon. 558.

At the time of the execution of the will in question, every married woman, the same as all other persons of age and sound mind, had the power by statute to dispose of her real and personal estate by will. V. S. 2346. Whatever may be said concerning the conclusive effect at common law of the probate of the testament of a married woman as a waiver of the husband's marital rights in her personal estate, the doctrine has no force here, by analogy or otherwise. For since the wife's testamentary power under the statute does not in any degree arise from the assent of the husband, neither the validity of her will, nor its probate, depends on such consent being shown. And it not

being essential to either, the surviving husband cannot on any principle of estoppel be precluded by the probate from subsequently asserting his right of election. Indeed, since the statute (V. S. 2356) expressly provides that "the probate of a will of real or personal estate shall be conclusive as to its due execution," its conclusiveness is impliedly so limited. The maxim, the express mention of one thing implies the exclusion of another, is here applicable. *Nimblet v. Chaffee*, 24 Vt. 628; *In re Varnum*, 70 Vt. 147.

Morton v. Onion, 45 Vt. 145, was an appeal from the decree of the probate court establishing Polly Carey's will executed before marriage and after married women had been given the power by statute to devise their real estate, but before any statute enabling them to bequeath their personalty. After making the will she married. She died without issue, and the surviving husband gave his consent in writing to the establishment of her will. Considerable of the property disposed of by the will remained in the testatrix, unaffected upon her death, by any marital rights of the husband. The probate was opposed by the heirs on the ground that the will was executed while the testatrix was a femme sole, and that it was revoked by her subsequent marriage. The will was held entitled to probate. The case of *Hodsden v. Lloyd*, 2 Bro. Ch. 534, cited above, was there recognized as stating the true doctrine of the law touching the assent of the husband as affecting the disposition of personal estate of the wife by will; but to what extent the application of that doctrine might differ in this State from its application in England on account of the difference of his marital rights in the two jurisdictions, the Court deemed it not important then to discuss or determine.

Later an appeal was taken from the decree of the probate court distributing Carey's estate in accordance with the provisions of the will, and that is the case reported in the 49 Vt. 239, to which reference has been made. The lawful heirs and appellants there contended that the distribution made was erroneous, at least as far as the personal estate was concerned, claiming a revocation of the will to that extent by the testatrix's marriage. It was held that the only conclusive effect of the probate of the will was as to its due execution; that it did

not settle what property should pass by it; that questions as to what it did pass remained to be then determined on the case agreed; that the will being established it would pass all the property embraced in its provisions over which the testatrix had testamentary power at the time of her death, namely, the real estate; but that as to the bequests of personalty, it was revoked by the marriage and was inoperative.

In principle the question of what part of the estate passes by the will, and what under the law of descent, is the same whether it arises, as in the case last cited, where it was contended that the will was inoperative as to some part of the estate because of lack of testamentary ability, or as here where it is urged that the waiver is inoperative by reason of the acceptance of the provisions of the will.

In *Ward v. Church*, 66 Vt. 490, the bill was brought for the construction of a will. The case stood on the master's report. The will was proved, and the estate settled in the probate court. The oratrix was the only child and heir at law of the testator. Her mother, who took a life estate in the property, died before the settlement of the estate. At the time of the settlement all parties in interest were either present or represented by attorney. The probate court decreed to the oratrix a life estate in all the property of the estate, "pursuant to the last will and testament of the deceased and the laws of this State." From this decree no appeal was taken. In the court of chancery it was contended that, under the will and the laws of this State, the oratrix took the entire estate, real and personal, in fee; and she brought her bill to have it so declared. It was held that, in distributing the estate, on the settlement thereof, it was the province of the probate court to determine and adjudge the kind of estate in the property, to which the oratrix was entitled; that she had the right to have her interest in and to the property then being distributed determined and decreed accordingly; and that if the decree did not give her the kind of estate to which she was entitled, she could and should have appealed therefrom.

Upon principle and authority therefore we think it clear that the surviving husband's right of waiver was not affected by his failure to object to the probate of the will, nor by his omission to take an appeal therefrom; and that any question

whether he shall take under the will, or under the statute of descent by force of his waiver, is involved in the decree of distribution, and should be determined in connection therewith.

Secondly. Did the proceedings of waiver survive the death of the husband? It is argued that the right was personal to him, and that notwithstanding he made his election and notified the probate court thereof within the time allowed for that purpose, no action was had thereon by the court in his lifetime, hence the waiver was not made complete and did not survive to his executor or administrator. Assuming that such right is personal to the husband, and that it does not pass to his representatives, the question is, whether any action of the probate court was in law essential to the completeness of the waiver. Again advertng to the Laws of 1896, No. 44, section 5, it is seen that after specifying the time in which a widow may exercise the power of waiver "and notify the court of her election in writing," instead of providing for a hearing thereon, the statute then reads: "and the court shall thereupon order said one-third set out as in other cases." The language used is too plain to admit of any doubt that in case of a waiver under the provisions of that section, no action of the probate court is necessary to perfect the act. And since the waiver of the provisions of a wife's will by the surviving husband may be had in the same manner, no action of the court was required to make the waiver in question complete. See 1 Pom. Eq. Jur. sec. 514; *Register v. Hensley*, 70 Mo. 189. It follows that the waiver by Edward W. became a perfected act in his lifetime and that the question of the survival of the right does not arise.

The holdings in connection with the points above considered are decisive that in overruling the objection to the granting of the extension of time to the surviving husband in which to make his election; in overruling the motion to dismiss the waiver-proceedings by reason of his death; and in sustaining the demurrer to the motion to dismiss and to the so-called plea in abatement and adjudging the plea insufficient, there was no error.

The will, which is referred to and made a part of the petition, contains the provision: "I give to my beloved husband, Edward W. Peck, the possession, management, use and control and income of all my estate, real and personal, during his natural life—subject to the payment of the annuities hereinafter

provided." The annuities to which reference is thus made are several in number, aggregating at least \$25,000.

The petition alleges in short that at the decease of his wife, Edward W. entered immediately into the possession, control and management of her entire estate, and continued in the possession, management, use and control thereof till the time of his death appropriating to himself all of the income and a portion of the principal of the estate, the whole in value a large sum, to wit, more than twenty thousand dollars, under a claim of right conferred upon him, as he said, by virtue of the terms and provisions of the will, repeatedly asserting that he was so managing and using the property; and that no portion of the estate thus used and appropriated, was ever returned or offered to be returned by him to the estate; that long after Edward W. had received the entire income of the estate, and long after he had appropriated to himself large sums of the principal, he, on the 23rd day of September, 1904, filed in the probate court his application in writing stating, among other things, that he then had under consideration the matter of waiving the will and that he could not yet intelligently determine whether he ought to make such waiver, asking for an extension of time for that purpose; that on the 12th day of December following, he filed in the office of the court a notice in writing that he elected to waive the provisions of the will, etc.

To this the executors answered, secondly, that Edward W. within the time limited by statute for him to exercise the right of waiver, applied to the probate court for an extension of time in which to make his election, which application was granted, and that within the time of such extension he waived the provisions of the will and notified the court thereof in writing, reciting the notice; and thirdly, that the will was proved by the probate court on the first day of February, 1904, on which day the executors named therein, Nichols and Wainwright, duly qualified as such; in short, that the executors caused an inventory and an appraisal of the property of the estate to be made and filed, also filed their own inventory charging themselves with the property, all as required by law; that thereafter during the lifetime of Edward W. the executors retained the possession, management, and control of the estate; and that Edward W. did not have the possession, management, use, control, and income of all the estate, he receiving of the same only what they

permitted him to have and gave him from time to time at his request; that he had the occupancy of the residence belonging to the estate, the use of the personal property therein, the use of the horses, carriages, etc., all under an agreement with the executors that he should be charged for the use thereof—the sum to be fixed by the probate court; that the executors kept a true and accurate account of the dealings between the estate and Edward W., charging him with cash advanced, and for the use of the residence, etc., and, in view of the injunction issued in the chancery case, crediting him with cash refunded to the estate at the end of each year, on account of advancements to him in excess of the net income of the estate; and that except as shown by the account so kept, he did not in his lifetime after the decease of his wife have or receive any of her goods, chattels, or estate.

The replication to the second point in the answer is substantially like the petition, except that in some respects the allegations are made with greater particularity and contain additional facts in substance as follows: that for more than twenty years before his wife's death Edward W. had the exclusive control and management of all her property and during all that time handled the same as her trustee and agent; that at the time of her death with full knowledge of all questions relating to title and value of all the property of her estate, and with full knowledge of all his rights, he immediately entered into possession, control, and management of all said property, and used and appropriated to his own use and benefit the entire income of the same, as long as he lived, and elected to take and did take, hold, accept, and use the same under and by virtue of the provisions of her will creating for him a life estate, thus continuing to the time of his death; that in the control and management of the property as aforesaid he used and expended a large amount of money, both of the net income of the estate and of the principal, and during the same time enjoyed the rents and profits of the homestead of which his wife died seized—all of which rents, income, and principal by him so appropriated exceeded \$25,000, no part of which was ever paid back or returned to the estate, nor was the same ever tendered to anyone representing the estate; and that in the occupation and management of the property of the estate, he declared and proclaimed that he was so occupying and managing it under and by virtue of the life estate

provided for him by his wife, and that the terms of her will should be observed and fully performed by him as long as he lived.

To the third point made in the answer the petitioner demurred, which demurrer was overruled and the answer adjudged sufficient. To the replication to the second point in the answer the executors demurred, and the demurrer was sustained *pro forma*. Exceptions were taken to these rulings, also to the judgment that the petition be dismissed with costs, and that the waiver be sustained and the estate distributed according to law. These exceptions present the third question argued: whether Edward W. by his acts accepted the provisions of the will and thereby estopped himself from taking of the estate under the statute of descent.

On the allegations under the third point of the answer it is clear that ever after the probate of the will the possession, management, and control of the property of the estate were in the executors and being exercised by them. It is equally clear that Edward W. did not have the possession, management, use, control, and income of all the estate, real and personal, at any time after the testatrix's death, within his natural life. Hence there was nothing in his acts inconsistent with his waiver by which he in his lifetime, or his personal representatives after his decease, could be estopped from taking of the estate according to the statute. The third point made in the answer was sufficient, and the demurrer was properly overruled. The demurrer to this part of the answer was special; but since the technical accuracy of the common law has never been deemed essential to the form of pleadings in questions of this character on appeal from the probate court, the demurrer has been considered as general and to matters of substance only.

Is the replication to the second point in the answer sufficient? The election made by Edward W. according to the mode prescribed by the statute was in law an express election,—1 Pom. Eq. Jur. sec. 514,—and he cannot be precluded from taking in opposition to the will, unless his acts of which his declarations form a part, are shown to have been so manifestly inconsistent therewith that justice and equity, as respects the interests of others, require it. *Fitts v. Cook*, 5 Cush. 596. Certainly in the circumstances of this case nothing less than such acts as, had there been no express election, would constitute an

implied one to take under the will, can work an estoppel *in pais*. An election may be by matter *in pais* as well as by matter of record; but it can be only by plain and unequivocal acts, with full knowledge of all the circumstances, and of the party's rights; and such acts must be done with the intention of electing. *Strafford v. Powell*, 1 Ball and B. 1; *Dillon v. Parker*, 1 Swanst. 380; *Edwards v. Morgan*, McClell. 541. It is admitted by the demurrer that Edward W. had such knowledge. Hence the question narrows itself to the effect of his acts. The allegations show that immediately after the death of his wife he entered into the possession, control, and management of all the estate, and used and appropriated to his own use and benefit the entire income thereof to the time of his death; and they further show that during the same time he appropriated to his own use and used "large portions of the principal," so that the rents, income, and principal thus appropriated and used exceeded \$25,000. How much of this aggregate sum was of the principal does not appear; but construing the allegation most strongly against the pleader, it must be the larger part. By the will he was given the possession, management, use, control, and income of all the estate during his natural life, but he was given no part of the principal. He did not act in ignorance, since as admitted by the demurrer he was fully advised of his rights under the law, also under the will. In what way did he take "large portions of the principal"? Certainly not under the will. The only way in which he could take of the principal was by an election to take under the statute. There is to be considered in connection herewith the allegation that Edward W. for a large number of years before the testatrix's death had the exclusive control and management of all her property, handling it during all the same time as her trustee and agent. This shows his relation to the property at the time of her death to have been such as in reason fairly to require him thereafter to continue in the control and management thereof, as far as necessary to its preservation and safety, until such time as he could relinquish the same to her personal representatives. Also the acts of Edward W., set forth in the petition and admitted, in making an application to the probate court within the specific time allowed by statute in which to make an election, asking for further time and stating therein, "that said matter is now under consideration and that he cannot yet intelligently determine

whether he ought" to waive the provisions of the will, and in subsequently making the express waiver against the will.

Excluding the acts constituting the express election and the notice thereof, his acts alleged are in part evidence of an intention of election in favor of the will, and in part of an intention of election against it, the latter way of as much or more force as the former. They do not show an intention either way to the rejection of the other, without which there can be no election. It cannot be said therefore that the acts in question show plainly and unequivocally an election to take under the will. Consequently they do not preclude a taking according to the election expressly made. In *Padbury v. Clark*, 2 Macn. & G. 298, Lord Cottenham said: "If a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt, affording no proof of preference, cannot be an election to take the one and reject the other." This principle was applied and held controlling in *Spread v. Morgan*, 11 H. L. Cas. 588, Lord Cranworth saying, "The true doctrine is very correctly stated by Lord Cottenham in *Padbury v. Clark*." Decisions were made upholding the same principle in *Dillon v. Parker*, 1 Swanst. 359; *Marriot v. Badger*, 5 Md. 306; *Whitridge v. Parkhurst*, 20 Md. 62. The replication was therefore insufficient and the demurrer was properly sustained.

As the case was presented the judgment dismissing the petition with costs, sustaining the waiver, and ordering distribution of the estate according to law, construing the last part as having reference to that portion of the estate in controversy in these proceedings, namely, the surviving husband's interest, and as ordering that it be distributed according to the law of descent, was well enough. Yet since the express waiver was effective without any declaration of the court, unless the estoppel *in pais* was made out, that part adjudging the waiver sustained was superfluous. Pursuant to the agreement of parties, however, *the judgment is reversed pro forma and cause remanded with leave to replead.*

IN RE ALICE HOWARD'S ESTATE.

Special Term at Brattleboro, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 16, 1908.

*Taxation—Collateral Inheritance Taxes—Liability For—Debts
Due From Nonresident Debtors—Law Governing—Statutes
—Construction—Absurd Purpose—No. 46, Acts 1896, and
No. 30, Acts 1904.*

Though debts due a decedent domiciled here from nonresident debtors pass by the laws of the state of the debtor's residence, if fully administered and distributed in the courts of that jurisdiction, yet where, without such foreign administration, such debts are collected and brought here by the decedent's administrator appointed in this State, they pass under our law, by the final decree of the probate court here.

A person domiciled in this State died owning and possessing here certain promissory notes against nonresidents and secured by mortgage of land without this State. Her administrator, appointed in this State, collected the notes and brought the proceeds here, without any foreign administration. *Held* that such proceeds thereby became a part of the decedent's estate here, to be administered under the laws of this State; and that collateral succession thereto, being elsewhere untaxed, was subject to the tax imposed by No. 30, Acts 1904, taxing collateral succession to property "passing by will, the law of descent, or decree of a court of this State." *In Re Joykin's Est.*, 76 Vt. 88, distinguished. In construing a statute, an absurd purpose is not to be attributed to the lawmakers, and a construction that leads to an absurd consequence must always be avoided; hence, when the intention can be collected from the statute, words may be modified, altered, or supplied so as to avoid an absurdity, repugnance, or inconsistency.

The word "persons" in §81, No. 30, Acts 1904, providing that the collateral inheritance tax imposed by certain previous sections "shall also apply to all *persons* who deceased prior to the enactment

hereof but whose estates shall not have been at the date of such enactment decreed or distributed," refers to the persons from whom the property passes and not those who receive it.

No. 46, Acts 1896, taxed collateral succession to property "within the state" passing by the intestate laws, and No. 30, Acts 1904, included debts from nonresidents in fixing the amount of such tax. The latter Act does not, except as otherwise provided, affect *liability* for taxes accrued or accruing under the former Act, which for the purpose of collecting such taxes remains in force, and so far as the two Acts are the same or similar the latter is to be construed as a continuance of the former. Inconsistent provisions are repealed, but such repeal does not affect the validity of a tax accrued or accruing when the latter Act was enacted, nor a proceeding had or commenced affecting an accrued tax. Therefore, since the Act of 1896 did not include debts due from nonresidents in fixing the amount of an estate to be taxed, a tax on the succession to the proceeds of such debts collected for an estate in process of settlement when the Act of 1904 was passed was properly assessed under the provisions of that Act, and is not defeated by the saving clauses thereof.

APPEAL by J. E. Cushman, as Commissioner of State Taxes, from an order and decree of the probate court as to the amount of collateral inheritance tax for which the distributees of the estate of Alice Howard are liable. George C. Brockway, administrator. Heard on an agreed statement of facts at the June Term, 1907, Windsor County, *Waterman, J.*, presiding. Judgment, *pro forma*, that said distributees are subject to the collateral inheritance tax imposed by No. 30, Acts 1904, on their right to succeed to the proceeds of the debts in question. The administrator excepted. The opinion fully states the case.

Frederick C. Southgate for the administrator.

Although the exact amount of a beneficiary's interest may not then be ascertained, it vests in him at the death of the decedent less the amount of the undetermined tolls under the law then in force. *In re John Guy Vassas*, 127 N. Y. 1.

The tax imposed by the Act of 1904 is a special tax, not a general one, and the law imposing it must be strictly construed

against the government, and no person can be subjected to special burdens without the clear warrant of the law. *In re Hannah Enston*, 113 N. Y. 174. This is not a tax on person or property, but "all agree that this is a tax upon the right to succeed to estate left vacant by death." *In re Joyslin's Est.*, 76 Vt. 88; *Dos Passos on Inher. Tax Laws*, §8; *Orcutt's Appeal*, 97 Pa. St. 179; *Maryland v. Dalrymple*, 3 L. R. A. 372; *Frothingham, Exr. v. Shaw*, 175 Mass. 59; *Minot et al. Exrs. v. Winthrop et al.*, 162 Mass. 113; *Plumer v. Coler*, 178 U. S. 115.

Debts due a resident decedent from nonresident debtors have their situs in, and pass by the law of the jurisdiction of the debtors, and are not at all subject to our law, hence not taxable here. *Walton v. Hall*, 66 Vt. 455; *Vaughan v. Barrett*, 5 Vt. 333; *Abbott v. Coburn*, 28 Vt. 664; *Purple v. Whithed*, 49 Vt. 187.

Clarke C. Fitts, Attorney General, for the State.

The Legislature has the power to impose retrospective taxation unless there is an express constitutional prohibition. "It may as well have regard to benefits theretofore received. as to those which may be assessed thereafter." 1 *Cooley on Tax*. 492; *Locke v. New Orleans*, 4 Wall. 172. "An inheritance tax that applies to estates that have been probated before its passage, but are to be distributed after it takes effect, is not unconstitutional as to such estates." *Gelsthorpe v. Furnell*, 20 Mont. 299; *State v. Whittlesey*, 17 Wash. 447. In the absence of constitutional provision forbidding retroactive legislation, such laws are not invalid unless they interfere with contracts or vested rights or come under the head of *ex post facto* law. *Lewis' Suth. St. Cons.* §647; *Grout v. Johnson*, 73 Vt. 268; *Smith v. Hard*, 59 Vt. 13.

There was never any foreign administration of the fund in question; and at common law personal property can descend only through the medium of administration, hence these distributees must take under our law, if they take at all. *Re Hodge's Est.*, 63 Vt. 661; *Foss v. Sowles*, 62 Vt. 221; *Pritchard v. Norwood*, 155 Mass. 159; and exhaustive note to *McBride v. Vance*, 112 Am. St. Rep. 723.

WATSON, J. Alice Howard, domiciled at Hartford, this State, died about June 1, 1904, intestate. Administration was granted on her estate June 2, 1904. The final decree of distribution was made March 31, 1905, whereby the net residue of the estate after the payment of debts, etc., was decreed to collateral relatives, the same persons who were by the laws of this State the heirs at law of the decedent at the date of her death. Among the assets of the estate so distributed were proceeds of certain notes against persons residing, and secured by mortgage on real estate, without this State, which notes and mortgage were in her physical possession and held by her here at the time of her decease. The administrator, before the final decree, collected the several sums due on the notes and brought the proceeds, amounting to \$3705, into this State, where the same remained until distributed as a part of the assets under that decree. No claim is made that any tax was ever lawfully paid to any other state or government for or on account of any distributive share, or any portion of these assets. The question is, Are the collateral relatives taking such distributive shares of the proceeds of said notes subject to a collateral inheritance tax thereon, under the laws of this State? By Laws of 1904, No. 30, sec. 1, every person and every society or institution, other than those there exempted, "that shall receive in trust or otherwise any legacy or distributive share comprised of or arising from property or any interest therein passing by will, the law of descent or the decree of a court in this State, from any deceased person who owned such property at the date of his decease shall, except as herein otherwise provided, be subject to a tax for the use of the State equal to five per cent. of the value in money of such legacy or distributive share." By section 3, if a similar tax shall have been lawfully paid to another state or government, not the United States, for or on account of a legacy, distributive share, or any part thereof which should thereafter be decreed by a probate court of this State to a legatee or heir liable to the tax imposed by section one, such legatee or heir shall be liable to pay to this State only such part of the tax as would make the entire taxes both within and without the State based on such portion of a legacy or distributive share taxed in such other state or government equal to five per centum of the total value thereof to be determined by the provisions of that act.

By No. 46, Acts of 1896, "All property within the jurisdiction of this State, and any interest therein, * * *, which shall pass by will or by the intestate laws of this State, * * *, shall be subject to a tax," etc. In the matter of *Joyslin's Estate*, 76 Vt. 88, the testatrix died domiciled in this State, and the question was, as here, whether debts due her from non-residents of the State were to be included in fixing the amount of the estate subject to such tax. It was contended in behalf of the State that they should be. But it was held that the phrase "within the jurisdiction of this State," meant within its probate jurisdiction; that under the settled law of the State, on the death of the creditor, such debts became *bona notabilia*, hence they were not within this jurisdiction; that the meaning of the phrase, "pass by will or by the intestate laws of this State," was, to pass by virtue and force of the law of the State governing testate or intestate succession; and consequently that such debts were not included. The opinion in that case was filed November 30, 1903, and presumably was known to the Legislature at the time of the enactment of No. 30, of the Laws of 1904. It will be noticed that under the later act property forming the basis of the tax is not limited to that within the probate jurisdiction of this State, as in the earlier law: it includes not only property which shall pass by will or by the intestate laws of the State, as did the earlier act, but it includes also property which shall pass by "the decree of the court of this State." Thereunder the test is not whether the property was within the probate jurisdiction of this State, but whether it passes in one of the ways specified. It is argued in behalf of the administrator that property in a foreign jurisdiction passes by its laws whether subject to a succession tax there or not, and that hence debts *bona notabilia* are not covered by the act in question. This would seem to be so when the estate is fully administered in the courts of that jurisdiction and the property distributed to the beneficiaries in conformity with the court's order there, as in the case of *Tilt v. Kelsey*, 207 U. S. 43, 52 L. ed. —. But in the case at bar the record does not show that any administration, ancillary or otherwise, was had in the foreign jurisdiction. On the contrary it appears that the several sums due on the notes mentioned were collected by the administrator appointed in this State, and that by him the proceeds were brought here, where they formed a part of the assets which passed by the final decree of the probate

court. We think the law of 1896 was so changed by the new act as to include such assets in its basis of taxation, and that this was the intent of the Legislature. When the assets from the foreign jurisdiction became a part of the estate here for distribution, the transmission thereof to the beneficiaries necessarily depended upon and involved the laws of this State, consequently it is subject to taxation by the State. *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439.

By section 81, "The first seventy-nine sections of this act in so far as they shall pertain to a tax imposed by this act upon a person, corporation, society or institution that shall in any manner hereinbefore provided receive property or any interest therein passing from a deceased person, shall also apply to all persons who deceased prior to the enactment hereof but whose estates shall not have been at the date of such enactment decreed or distributed: provided, however, that if any part of an estate has been lawfully paid or decreed prior to the enactment hereof such part so paid or decreed shall not be affected by this act, * * *." It is contended by the administrator that in the clause "shall also apply to all persons who deceased prior to the enactment hereof," etc., the word *persons* has reference to those who receive the property, not those from whom it passes. But with this construction we cannot agree. Under section six, any administrator, executor or trustee having in charge or in trust any legacy or distributive share passing to a legatee or heir liable to such tax, shall before paying or delivering the same to the legatee or heir deduct the tax therefrom, or collect it from him; section seven, in case the tax can not be thus deducted and the legatee or heir neglects or refuses to pay it, the probate court may license the administrator, executor, or trustee to sell any part or all of a legacy or distributive share for the payment of the tax; section eight, an administrator, executor, or trustee shall not deliver any specific legacy, etc., to any legatee or heir liable to the tax until the tax has been deducted or collected; section nine, any person having in charge or trust as administrator, executor, or trustee any legacy or distributive share so passing to a person, shall be liable for all such taxes imposed with lawful interest until the same have been fully paid. Thus the deduction or collection of the tax is by law made a prerequisite to paying a legacy or distributive share to any person entitled thereto; and should such person de cease before receiving

the same, the requirements of the law in this respect remain unchanged, in whatever state of settlement his estate may be. In view of the provisions of these sections, and of the settled law that such a tax is not on property, but on the transmission of property,—*In re Joyslin's Estate*, 76 Vt. 88; *In re Hickok's Estate*, 78 Vt. 259,—what difference can it make with the tax, its assessment, deduction, or collection under the law, whether the legatee or distributee be alive or dead, and if the latter whether his estate had been decreed or distributed at the date of the new enactment? Moreover, if the word *persons* has reference to beneficiaries, as contended by the administrator, then the *estate* mentioned in the clause under the first proviso following means the estate of a beneficiary, and the statute paraphrased is made to read: provided, however, that if any part of an estate of a legatee or distributee taking property passing from a deceased person has been lawfully paid or decreed prior to the enactment of this law such part so paid or decreed shall not be affected by this act,—thus leading to absurdity. But an absurd purpose is not to be attributed to the lawmakers, and a construction that leads to an absurd consequence must always be avoided. *People v. Commissioners*, 95 N. Y. 554.

On the other hand, if the word *persons*, like the word *person* previously used in the same line, has reference to deceased persons from whom the property or interest therein passes, as it would were it preceded by the word *such* (V. S. 15), then the provisions of that section are consistent and intelligible: the law applies where the person died before the date of the passage of the act, if his estate had not then been decreed or distributed; but if any part of the estate had been lawfully paid or decreed to such part the law has no application. We think this is in accordance with the obvious intent of the Legislature and that the law should be so construed. It is a rule of construction too well established to require the citation of authorities, that when the intention can be collected from the statute, words may be modified, altered, or supplied so as to avoid any absurdity, repugnance, or inconsistency which would otherwise exist.

It is further urged that the statute of 1896 still regulates the tax in estates in process of settlement when the law of 1904 was passed. The later act does not, except as otherwise provided, affect the liability of any person, etc., to pay the tax or taxes already accrued or accruing under the provisions of the

earlier law which for the purpose of assessing and collecting such taxes, remained in full force. So far as the provisions of the two acts are the same or similar, the later act is to be construed as a continuance of the other. And all acts or parts of acts, except as otherwise provided, inconsistent with the provisions of the later act, were repealed; but such repeal was not to affect the validity of a tax accrued or accruing at the time of the enactment thereof nor a proceeding had or commenced affecting any tax already accrued except as therein otherwise provided. Sec. 82-85. It is upon these provisions of the statute that this argument is based. But the unsoundness of this position is apparent. Since the law of 1896, as construed in the Joyslin case, did not include debts due from non-residents in fixing the amount of an estate to be thus taxed, the tax here in controversy had not accrued, nor was it accruing, before the provisions of the new act including such debts took effect, December 9, 1904, and by which it was imposed.

No other questions were presented in argument.

Judgment affirmed with costs to the State. To be certified to the probate court.

H. D. SNYDER v. P. L. PARMALEE.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 17, 1908.

Mortgages—Sale of Part of Mortgage Debt—Effect as to Security—Trusts—Common Law Suit by Beneficiary Against Trustee—When Maintainable—Pleading—Surplusage.

In equity, where there is no agreement to the contrary, the mere sale of one of a series of promissory notes secured by the same mortgage carries with it a proportionate share of the mortgage security, and

the mortgagee thereafter holds the mortgage in trust for such purchaser to the extent of his interest.

By exception to the general rule that trusts are cognizable only in equity, a trustee may sometimes be sued at law by his beneficiary after the termination of the trust, as where the trust involves merely the investment of a fund and a specified application of its income, the principal to be paid to the beneficiary in a certain event, and that event has happened and the beneficiary become entitled to the fund.

Where a trustee has, in violation of his trust, so disposed of the trust estate that it cannot be followed, either in its original or substituted form, he may be sued at law by the beneficiary to recover damages for the breach of trust.

Where defendant, a mortgagee holding the mortgage in trust for plaintiff to the extent of one of the notes thereby secured, discharged the mortgage without plaintiff's knowledge or consent and in such circumstances that he cannot be reinstated, the mortgagee is liable to plaintiff in a suit at law for the damages caused by his wrongful act, regardless of whether it was fraudulent. In such case it is not necessary to plaintiff's recovery that the discharge should have been fraudulently made, as the fact that defendant discharged the mortgage against plaintiff's right, and to his damage, is sufficient.

A court of law may consider and pass upon the facts constituting a trust, in order to ascertain whether the trustee's treatment of it entitled the beneficiary to a legal remedy.

A plaintiff need not prove more than is necessary for recovery, although more be alleged.

CASE for fraudulently discharging a mortgage. Plea, the general issue. Trial by jury at the March Term, 1907, Chittenden County, *Hall, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

Martin S. Vilas, and Cowles & Moulton for the defendant.

The defendant's motion for a verdict should have been granted. The declaration relied on fraud, and none was proved.

Colson v. Bean, 78 Vt. 283. There was no evidence that defendant knew that the note had not been paid, and that was necessary to constitute fraud. *Derry v. Peck*, 12 E. R. C. 250; *Weir v. Bell*, 3 Ex. Div. 238.

At law fraud is never presumed, but must be proved, whereas in equity it may be presumed from the relative situation of the parties. *Jackson v. King*, 4 Cowen 207; *Gallatin v. Cunningham*, 8 Cowen 362; 1 Bigelow, *Fraud*, 137-138.

After the defendant transferred the note in question he held the mortgage as trustee of plaintiff to the extent of his interest in the security. The relation was that of trustee and beneficiary, and a beneficiary cannot sue the trustee at law for the invasion of a purely equitable right. *Norton v. Ray*, 139 Mass. 230; 2 Perry on Trusts, (5th ed.) §843.

M. A. Bingham and *H. F. Wolcott* for the plaintiff.

It is not necessary that the transfer should be in writing nor recorded, nor that the holder of the note should know of the existence of the mortgage security. *Pratt et al. v. Bank of Bennington*, 11 Vt. 294; *Keyes et ux. v. Wood et al.*, 21 Vt. 331; *Belding v. Manley et al.*, 21 Vt. 550.

Since plaintiff has at law an adequate remedy, he is confined to that. *Currier v. Rosebrooks*, 48 Vt. 36; *Abbott v. Booth*, 7 Vt. 181; *Washburn v. Titus*, 9 Vt. 211; *Smith v. Penningill*, 15 Vt. 82.

MUNSON, J. The plaintiff seeks to recover on a declaration at law which charges that the defendant fraudulently discharged a mortgage held by him, which secured a note belonging to the plaintiff that was otherwise valueless, and that the property was thereupon sold for cash to one who had no notice of plaintiff's claim. The defendant questions by his exceptions and argument the sufficiency of the allegation of fraud, the presentation of any evidence tending to show a fraudulent intent, the correctness of the charge as to what constitutes fraud, and the plaintiff's right to recover in a court of law.

The following facts were conceded at the opening of the trial. Blish executed to the defendant a mortgage of real estate to secure an indebtedness represented by a series of notes, and

afterwards conveyed the premises to Gonyeau, who assumed the payment of the mortgage debt. Soon after this the defendant sold one of the notes to the plaintiff, indorsing it without recourse. Blish died about this time, and his estate was duly settled and closed. Gonyeau afterwards conveyed the property to Parizo, who had no knowledge of plaintiff's claim; and defendant discharged the mortgage at or about this time. The property released was ample security for the note. It appeared further, from uncontradicted evidence, that there was no assignment of the mortgage on record. The only questions submitted to the jury had reference to the fraudulent character of the discharge, and the financial responsibility of Gonyeau. Neither party claimed the submission of anything further.

The transfer of the note carried with it a proportionate share of the mortgage security, and the defendant afterwards held the mortgage in trust for the plaintiff to the extent of his interest. *Keyes v. Wood*, 21 Vt. 331. It may be stated as a general proposition that matters of trust are cognizable only in equity, and that a trustee cannot be sued at law by his beneficiary. *Perry, Trusts* §17; *Congdon v. Cahoon*, 48 Vt. 52. But a suit at law can sometimes be maintained after the determination of the trust. When a fund has been placed in the hands of a trustee for investment and a specified application of the income, and the principal sum made payable to the beneficiary on the happening of a certain event, and the purpose of the trust has been carried out and the beneficiary has become entitled to the fund, it may be recovered in an action at law, even though the ascertainment of the amount requires the adjustment of a claim for compensation. *Lynde v. Davenport*, 57 Vt. 597; *Parker v. Parker*, 69 Vt. 352. A trustee may subject himself to a suit at law by his disposition of the trust estate. When a trustee has, in violation of his trust, so disposed of the trust estate that it cannot be followed, either in its original or substituted form, the beneficiary may sue at law to recover damages for the breach of trust; for he is then forced to rely on the personal liability of the trustee, and has no claim upon his estate superior to that of an ordinary creditor. *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141.

In this case, the defendant has cancelled the title which he held for the plaintiff's benefit, under such circumstances that it cannot be reinstated. The only remedy left the plaintiff is to

charge the defendant personally with the damage caused by his wrongful act. His suit at law involves nothing beyond this. He is not asking the court of law to recognize his equitable right as a subject of jurisdiction. He is not undertaking to enforce a trust or to follow a trust fund. There is no principle which precludes a court of law from considering and passing upon the facts constituting a trust, to ascertain whether the trustee's treatment of it entitles the beneficiary to a legal remedy. We think the plaintiff may properly invoke the aid of a court of law.

Our next inquiry is whether the plaintiff's allegations and proof are sufficient to sustain the judgment obtained. It is not necessary to the plaintiff's recovery that the discharge should have been fraudulently made in any sense of the term. No question of reasonable proof or of honest belief is involved in the inquiry. It is enough that the defendant discharged the mortgage against the plaintiff's right and to his damage. The declaration shows a cause of action without reference to the allegation of fraud. A plaintiff need not prove more than is necessary to his recovery, although more be alleged. *Bosworth v. Bancroft*, 74 Vt. 451. The plaintiff is entitled to recover upon the facts presented by the concessions and by the uncontradicted evidence referred to. So it is not necessary to inquire whether the allegation of fraud was sufficient on motion in arrest, nor whether the finding of fraud was on correct instructions, nor whether there was any concession or evidence tending to establish fraud.

Judgment affirmed.

MATTIE C. REYNOLDS v. HERBERT HASSAM.

Special Term at Brattleboro, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 17, 1908.

Bastardy Proceedings—Intervention of Overseer of Poor—Order for Child's Support—Seasonableness and Scope of Objection Thereto—New Trial—Newly Discovered Evidence—Requisite Diligence—Necessity of Counsel's Affidavit Supporting Petition.

In a bastardy proceeding where plaintiff claimed that because of some disease or injury of his genital organs he was incapable of begetting plaintiff's child, the comment and inquiry of plaintiff's counsel in argument to the jury: "He has testified he had some disease of the generative organs. He does not see fit to tell us whence came the disease, whether by accident or otherwise. How do you suppose he contracted it?" though possibly suggestive of prior misconduct on defendant's part, cannot be treated as legal error.

In a bastardy proceeding, where the overseer of the poor had entered to prosecute, defendant excepted to the order for the support of the child "being made payable to the town of Bethel." *Held* that, no question having been made prior to the judgment as to the overseer's right to prosecute, the exception would not avail defendant to question the town's right to the payment, nor was it sufficiently specific to reserve questions as to the failure of the order to limit the successive payments to the life of the child and its need of support.

Defendant's petition for a new trial in a bastardy case, which involved the question whether he had intercourse with plaintiff during the month of January, based on his son's affidavit that he slept with defendant every night during that month and was with him continuously every day, will be denied where it is apparent that defendant knew all this before the trial, and that his knowledge

of the case charged him with the preparation of a defence covering that month.

A petition for a new trial on the ground of newly discovered evidence, though alleging the petitioner's ignorance thereof until after the trial, should be supported by his counsel's affidavit of like ignorance on his part, especially where his cross-examination arouses suspicion of the contrary.

BASTARDY PROCEEDING. Plea, not guilty. Trial by jury, at the December Term, 1906, Windsor County, *Taylor, J.*, presiding. Verdict, guilty; and judgment thereon. The defendant excepted.

Defendant claimed that as the result of some recent disease of his genital organs, or of surgical operations had for his relief, he was incapable of begetting the plaintiff's child, and, besides other evidence, relied on the testimony of a physician, Dr. Sherwin, who had examined him during the trial. It appeared that defendant was the father of a child twenty years of age. Plaintiff's counsel in his argument to the jury, subject to defendant's objection and exception, said: "For anything observed by Dr. Sherwin the defendant might have been in the same condition when his child was begotten as when he, Sherwin, examined him. He has testified he had some disease of the generative organs. He does not see fit to tell us whence came the disease, whether by accident, or otherwise. How do you suppose he contracted it? Does he say he received an injury?" None of these statements were withdrawn, and the court did not instruct the jury to disregard them.

The defendant also brought his petition for a new trial on the ground of newly discovered evidence, under V. S. 1662, to the Supreme Court for Windsor County at its special term at Brattleboro, November, 1907, which petition was then heard with defendant's exceptions.

Davis & Davis and Wallace N. Batchelder for the defendant.

The argument of plaintiff's counsel to which defendant objected and excepted, was prejudicial, unwarranted, and such error as should reverse the case. *Magoon v. Boston & Maine R. R.*, 67 Vt. 177; *State v. Hannett*, 54 Vt. 83; *Rea v. Harrington*, 58 Vt. 181; *Cobble v. Cobble*, 79 N. C. 589.

John J. Wilson, and Stickney, Sargent & Skeels for the plaintiff.

There was no error in making the orders payable to the town of Bethel. The statute so directs. V. S. 2730; *Humphrey et ux. v. Kasson*, 26 Vt. at p. 764.

MUNSON, J. The defendant claimed that as the result of some disease or injury of his genital organs, or of surgical operations had for his relief, he was not capable of begetting the plaintiff's child. It was of course the position of the plaintiff that no disease or injury had been shown that could justify the conclusion that this incapacity existed. In this situation, the comment and query of plaintiff's counsel to which exception was taken, although possibly suggestive of prior misconduct on the part of defendant, cannot be treated as legal error.

The defendant excepted to the order for the support of the child "being made payable to the town of Bethel." It is now urged in support of the exception that there was no evidence tending to show that the child was chargeable or likely to become chargeable to the town. No question having been made prior to the judgment as to the overseer's right to prosecute, the exception taken will not enable the defendant to question the town's right to the payment. Nor was the exception sufficiently specific to save the questions now argued as to the want of terms limiting the successive payments to the life of the child and its need of support.

Judgment affirmed.

The defendant's case for a new trial consists in part of the affidavit of his son. The plaintiff came to live in her father's family, where the defendant and his men boarded, late in December, 1905, and remained there, with occasional brief absences, until the very last of January, when she left town and remained away several weeks. The child was born October 23. These facts, which must have been known to the defendant, were sufficient to charge him with the preparation of a defence having reference to the month of January. The defence put in, other than evidence as to defendant's condition, was confined to his

own testimony in denial of the several acts of intercourse testified to by the plaintiff. If the defendant's son slept with him every night during the month, and was with him continuously every week day, and spent every Sunday at the house, the defendant knew all this before the trial as well as after, and the commonest prudence required that he have his son in attendance. If his son was sick and unable to attend, he should have moved for a continuance. The defendant is not entitled to have this affidavit considered.

It appears from other affidavits that the plaintiff was in Pittsfield several weeks in March and April, and that her board was paid by one Boutwell; that Boutwell frequently visited her and finally gave her money to procure a license for their marriage; that after this was procured and shown to Boutwell he left Pittsfield, sending the plaintiff word that he would return in a day or two, but not returning; that in subsequent conversations about her expected marriage and Boutwell's absence, the plaintiff referred to her condition and to Boutwell as the father of her child. It is alleged in the petition that the defendant had no knowledge of these matters until after the trial. The knowledge of his counsel is not negatived in any manner. The cross-examination of the plaintiff indicates that defendant's counsel knew of Boutwell and of the existence of some relation between the two. The general rule requires that a petition of this nature be supported by the affidavit of the attorney, and this case discloses no ground of exception, but rather a special reason for its application.

Petition dismissed with costs.

KATHERINE G. DUNLEVY v. EDWARD J. FENTON.

January Term, 1908.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 24, 1908.

Deeds—Deposit in Escrow—Wrongful Delivery—Effect—Pleading—Pleas of Confession and Avoidance—Requisites—Special Demurrer—Effect in Reaching Prior Pleadings.

A special demurrer reaches all the preceding pleadings, but has only the force of a general demurrer as to pleadings prior to the one specially challenged.

The allegation in a plea, that plaintiff by her deed under her hand and seal released and discharged defendant from the cause of action declared upon, argumentatively alleges a delivery of the deed, and so is sufficient on general demurrer.

A plea of confession and avoidance must contain at least an implied admission that the allegations sought to be avoided are true.

Where a plea alleges that plaintiff by her deed released defendant from the cause sued on, an allegation of the replication that plaintiff made the supposed deed of release pleaded by defendant is insufficient to give color.

When a deed is deposited in escrow to be delivered to the grantee only upon the performance of some condition, and the depository delivers it without such performance, there is no delivery in law, and the deed is without effect.

Where a plea relies on plaintiff's deed releasing and discharging defendant from the cause of action declared upon, a replication alleging the making of "said supposed deed of release," its deposit in escrow to be delivered to defendant upon performance by him of certain agreements, and his possession thereof wrongfully obtained without such performance, is bad on special demurrer, because it not only fails to admit the truth of the allegations sought to be avoided, but relies on facts wholly inconsistent with the existence of the release.

ASSUMPSIT for breach of a marriage promise. Heard on special demurrer to plaintiff's replication to defendant's sixth special plea, at the September Term, 1907, Windham County, *Haselton*, J., presiding. Demurrer overruled and replication adjudged sufficient. The defendant excepted. The opinion states the substance of the pleadings in question.

Gibson & Waterman, R. C. Bacon, and J. K. Batchelder for the defendant.

Although a special demurrer reaches back through all the pleadings and seizes upon the first defect, it has only the force and effect of a general demurrer beyond the particular pleading against which it is filed. *Kent v. Miles*, 65 Vt. 582; 1 Chitty's Pl. 540; *Spencer v. Southwick*, 9 Johnson (N. Y.) 315; *Sullivan v. Iron Silver Mining Co.*, 109 U. S. 342.

This replication, although in an indirect way it attempts to deny the fact of delivery by advancing new matter—showing a state of facts contradictory to and inconsistent with delivery—has no semblance to a direct traverse and the framing of an issue. It contains no direct denial; but indirectly, if at all, and inferentially, by advancing new and numerous facts, denies by implication the fact of delivery to the defendant. And further, another fatal defect, it concludes with a verification and not to the country as a traverse should. *Stevens on Pleadings*, (9 Am. Ed.) 481; *Kimball v. Railroad Co.*, 55 Vt. 95; *Merritt v. Miller*, 13 Vt. 416; 18 Am. & Eng. Enc. of Law 522; *Belknap v. Billings*, 76 Vt. 54; *Spencer v. Bemis*, 46 Vt. 29; *Lyll v. Higgins*, 4 Q. B. 528.

But if it is held that this replication by setting up another state of facts inferentially and argumentatively, not directly, denies the delivery of the release to the defendant, and so amounts to a general denial or issue, such a process is not allowable under the well established rules of pleading and may be reached by special demurrer. It is not a general issue as known in pleading but only "amounts to the general issue," and "to allow it would lead to innovation and confusion and tends to destroy settled distinctions, and to the introduction of new pleas unknown to the law." *Hayselder v. Staff*, 5 A. & E. 153.

Nor is the replication in confession and avoidance of the plea, for it sets up facts wholly inconsistent with the existence

of the release relied on in the plea. *Morse v. Lowe*, 44 Vt. 561; *Rich v. Elliot*, 10 Vt. 211; *Abbott v. Choate*, 47 Vt. 53; *Gillette v. Ballou*, 29 Vt. 296; *Gilmore v. Morse*, 14 Vt. 457; *R. R. Co. v. Bailey*, 24 Vt. 465; *Sanborn v. Chittenden*, 27 Vt. 171; *Davis v. Bradley*, 24 Vt. 55. The only ground in law that can be set up to defeat a sealed instrument duly delivered is fraud in its procurement. Beyond this equity alone can afford relief. *Tyler v. Gilmore*, 25 Vt. 411; *Townsend v. Webb*, 8 Mass. 146; *Dickson v. Blondin*, 58 Vt. 689; *Daw v. Munsell*, 13 Johns. (N. Y.) 430; *Com. v. Knapp*, 8 N. Y. 402; *Vrooman v. Phelps*, 2 Johns. (N. Y.) 177; *Stevens v. Judson*, 4 Wend. 473.

Butler & Moloney and *H. G. Barber* for the plaintiff.

The replication confesses the plea, for it acknowledges the making of the release, and avoids it by matters arising subsequent to its execution, and such matters are properly, if not necessarily, specially pleaded. *Reed v. Ins. Co.*, 54 Vt. 419; *Chit. Pl. 366*; *Gould's Pl. 346* (4th Ed. p. 308, §56); *Ins. Co. v. Wright*, 55 Vt. 531; *Joslyn v. Tracey*, 19 Vt. 569; *Gould's Pl. (4th Ed.) §54*; 3 *Chitty's Pl. 563*.

MUNSON, J. The plea alleges in substance that the plaintiff by her deed in writing under her hand and seal released and discharged the defendant from the cause of action sued upon, and covenanted and agreed that at the next succeeding term the suit should be entered "settled and discontinued," and makes profert of said deed.

The replication alleges in substance that the plaintiff made said supposed deed of release and delivered it to one Garceau, on condition and in consideration that the defendant then promised that he would make and deliver to the plaintiff a like deed of release discharging the plaintiff to the same extent, and would deliver to the plaintiff the pleas prepared in the case, and would leave five hundred dollars with Garceau for the plaintiff by a time stated, and that both parties should treat such agreement as strictly confidential; and alleges further that the parties were to meet at Garceau's office at the time stated, and that Garceau was then to deliver said money to the plaintiff and said supposed deed of release to the defendant, but that

said deed was not to be of any force until defendant had fully complied with every condition of said agreement; and alleges further that the terms of said agreement were made public by defendant, that said pleas were not delivered to the plaintiff but were filed in court, and that neither the defendant's release nor said sum of money was delivered to the plaintiff; that plaintiff was at Garceau's office at the time named and was then informed by Garceau that the defendant had not left said money as agreed, and that plaintiff waited some time without the defendant appearing, and then demanded of Garceau the return of her said supposed deed of release, but that Garceau refused to return it, and afterwards delivered it to defendant's attorneys against her protest, and that the supposed deed pleaded by defendant is not her deed of release; concluding with a verification.

The replication is demurred to; and special causes of demurrer are assigned, which are in substance, that it does not answer the plea, either by a general form of denial or by a denial of any single material fact; that it advances new matter, and thereby sets forth a contract different from that stated in the plea, and so amounts to the general issue; and that it does not confess and avoid any material allegation of the plea.

The plaintiff claims that the plea is defective in that it fails to allege a delivery of the deed of release; and that if it be held that a delivery of the deed is sufficiently alleged, the plea is double, in that it sets up a release of the cause of action and a covenant to discontinue the suit; and that inasmuch as the plea is bad, it is sufficiently answered by the replication, even though that be defective. The demurrer reaches all the pleadings, but has the force of a general demurrer only, as applied to pleadings prior to the one demurred to. So it reaches only substantial defects in the plea, and if a delivery of the release is argumentatively alleged the plea is sufficient, for argumentativeness and duplicity are but defects of form. We think a delivery of the deed of release is argumentatively alleged. The allegation is not that the plaintiff made a deed releasing the defendant, but that by her deed she released him, which implies a delivery. So the plea is sufficient, and if the replication stands it must be upon its merits.

The plaintiff argues that the replication is a proper plea of confession and avoidance; that the matters set up in avoidance

were not coincident with the execution of the release, but occurred after its execution, and so constitute no impeachment of its original validity; that the release became inoperative by reason of these subsequent occurrences, and that matters of avoidance thus arising may be specially pleaded.

It should be noticed at the outset that the matters set up as occurring subsequently to the execution of the release are not matters that arose independently of the contract as the replication alleges it to have been made. These subsequent occurrences, as alleged, were merely breaches of an agreement under which the deed of release was made and deposited. The replication alleges a delivery to a third person to be held for delivery to the defendant when certain conditions were complied with, and a possession wrongfully obtained without such compliance, and avers in conclusion that such supposed deed of release is not the plaintiff's deed.

A plea of confession and avoidance must at least give color to the matter to which it is applied; that is, it must so far confess the matter adversely alleged as to give the opposite party an apparent right—it must contain at least an implied admission that the allegations to be avoided are true. *Dunklee v. Goode-nough*, 65 Vt. 257; *Baker v. Sherman*, 75 Vt. 88. It follows that a plea of confession and avoidance which in effect denies the existence of the claim it opposes is defective. The plea rests upon the confession, for if there is no such adverse claim there is nothing requiring new matter in avoidance. Connected with this rule, and largely depending upon it, is the doctrine that a special plea amounting to the general issue is bad. 1 Chitty 526. A plea which sets up in reply a different contract from the one alleged is bad for this reason. It is an argumentative denial of what the adverse pleader must prove to sustain his claim. *Kimball v. Railroad Co.*, 55 Vt. 95; *Hayselden v. Staff*, 5 A. & E. 153.

The allegation of the replication that the plaintiff made the supposed deed of release pleaded by the defendant is not sufficient to give color. The plaintiff's brief proceeds upon the theory that the deed of release went into effect and was made inoperative by subsequent occurrences, but the allegations of the replication show that the deed never became operative. The replication sets forth a contract which led to the preparation of a deed of release, but the contract as set forth is entirely

inconsistent with the existence of the release as the defendant claims it. When a deed is deposited with a third person to be delivered to the grantee only upon the performance of some condition precedent, and the depositary delivers it without the performance of the condition, there is no delivery in law, and the deed is without effect. *Stiles v. Brown*, 16 Vt. 563. We hold the replication insufficient on both the grounds considered.

Judgment reversed; demurrer overruled as to the plea and plea adjudged sufficient; demurrer sustained as to the replication and that adjudged insufficient; and cause remanded.

IDA E. RICHARDSON v. GEORGE F. FLETCHER.

Special Term at Brattleboro, November, 1907.

Present: TYLER, MUNSON, WATSON, and HASELTON, JJ.

Opinion filed January 24, 1908.

Wills—Executor—Failure Seasonably to Present Will to Probate Court—Action for Penalty—Statute of Limitation—Fraudulent Concealment—Effect.

Since the right of action and the remedy, given by V. S. 2353 to a person interested in a will against the person named therein as executor for not seasonably presenting it to the probate court, are wholly statutory, V. S. 1990, providing that, "Actions upon a statute, for a penalty or forfeiture given in whole or in part to the party aggrieved, shall be commenced within four years after the commission of the offence, and not after," begins to run when such named executor commits the offence, regardless of the fact that he fraudulently conceals from the person injured that he had neglected so to present the will.

ACTION on V. S. 2359 against a person named as executor in a will to recover the penalty prescribed for not seasonably presenting it to the probate court. Heard on demurrer to replication to plea of the Statute of Limitations, at the June Term, 1905, Windsor County, *Rowell*, J., presiding. Demurrer sustained, and replication adjudged insufficient. The plaintiff excepted. The opinion states the case and the substance of the replication.

George A. Weston, and *Davis & Davis* for the plaintiff.

The fraudulent concealment set forth in the demurrer prevents the running of the statute. *Morrill v. Palmer*, 68 Vt. 1; *Bailey v. Glover*, 88 U. S. 342; *Booth v. Warrington*, 4 Bro. P. C. 163; *So. Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Hovenden v. Annesly*, 2 Sch. & D. 634; *Stearns v. Page*, 7 How. 819; *Moore v. Green*, 19 How. 69; *Sherwood v. Sutton*, 5 Mass. 143; *Snodgrass v. Bank*, 25 Ala. 161; *Miles v. Berry*, 1 Hill 296; *York v. Bright*, 4 Humph. 312; *Bree v. Bolbeck*, 2 Doug. 655; *Clark v. Haugham*, 3 Dowl. & R. 322; *Franger v. George*, 5 Barn. & C. 149; *Turnpike Co. v. Field*, 3 Mass. 201; *Wells v. Fish*, 3 Pick. 75; *Jones v. Vonoway*, 4 Yeates 109; *Rush v. Bars*, 1 Watts 110; *Pennock v. Freeman*, 1 Watts 401; *Carr v. Hilton*, 1 Curtis (C. C.) 230; *Homer v. Foote*, 1 Pick. 435; *Bowman v. Sanborn*, 18 N. H. 205; *Douglass v. Elkins*, 28 N. H. 26; *Way v. Cutting*, 20 N. H. 187; *Preston v. Cutter*, 64 N. H. 461; *Boomer v. French*, 40 Iowa 601; *Fendley v. Stewart*, 46 Iowa 655; *Persons v. Jones*, 12 Ga. 371; *Tex. & Pac. Ry. Co. v. Gay*, 86 Tex. 561; *Reynolds v. Hennessey*, 17 R. I. 164; *Cole v. McGlathy*, 9 Me. 131; *Smith v. Bishop*, 9 Vt. 110; *Bailey v. Glover*, 21 Wall. (U. S.) 347; *Gurby v. Lake Shore etc.*, 120 U. S. 130; *Traer v. Clews*, 115 U. S. 528; *Vance v. Mottley*, 92 Tenn. 310; *Lewis v. Denison*, 22 Wash. 149; *Deake Appt.* 80 Me. 50; *Dozier v. Ellis*, 28 Miss. 730; *Fears v. Sykes*, 35 Miss. 633; *Edwards v. Gibbs*, 39 Miss. 166; *Cocke v. McGinnis*, 1 Mart. & Y. 361; *Shelby v. Shelby*, 1 Coke (Tenn.) 179; *Reeves v. Dougherty*, 7 Yerg. 222; *Callis v. Waddy*, 2 Munf. 511; *Vanbibber v. Beirne*, 6 W. Va. 168; *Rice v. White*, 4 Leigh 474; *Londonderry v. Arnold*, 30 Vt. 401.

Hunton & Stickney for the defendant.

TYLER, J. This case was before this Court at the October term, 1901, on general and special demurrer to the declaration. It was then held that V. S. 2359 was a penal statute, and that the action having been brought to recover the forfeiture therein provided, the declaration was insufficient in that it did not contain a substantive allegation that the offence charged was committed against the form of the statute.

The amended declaration charges the defendant with having committed an offence against the statute. It alleges that the testatrix died July 21, 1889; that her will was in the defendant's possession from the time of its execution until July 5, 1898, when he presented it to the probate court. The defendant relies upon his four pleas of the Statute of Limitation. The fifth and seventh aver, respectively, that the alleged causes of action, if they ever existed, did not accrue and that the defendant was not guilty of any of the alleged wrongs at any time within four years next before the commencement of the suit; the ninth and tenth, that as to so much of the supposed wrongs as are alleged to have been committed more than four years before the commencement of the suit, none of them accrued and that he was not guilty of any of them within said four years, etc.

The replication is, in substance, that the defendant, knowing that he was executor of the will of Sarah A. Fletcher, having the will in his possession, and knowing that the testatrix died July 21, 1889, did designedly and fraudulently conceal from the plaintiff the fact that he, the defendant, had neglected to signify to the probate court, within the time prescribed by the statute, either his acceptance of the trust or his refusal in writing to accept it, and had not given the court any excuse, as the statute requires, for such neglects.

The demurrer admits the truth of the facts alleged in the replication, and the only question is whether, in view of those facts, the Statute of Limitation is a bar to the plaintiff's recovery of the prescribed penalties.

The plaintiff cites a large number of cases from which she claims that the general rule is, both at law and in equity, that in cases of fraudulent concealment, where the party injured remains in ignorance of the fraud without fault on his part,

the statute does not begin to run until the fraud is discovered. But this question is not before us and we are not required to render a decision upon it. It has already been held by this Court that the right of action here sought to be enforced and the remedy are conferred by the statute.

Sections 2357, 2358 and 2359 require that if a person has the custody of a will he shall, within thirty days after he knows of the death of the testator, deliver it into the probate court or to the executor named in the will; and that a person named as executor in a will shall, within thirty days after he knows of the death of the testator, or within thirty days after he knows that he is named executor, present such will to the probate court, unless it has been otherwise returned, and shall, within such period, signify his acceptance or refusal of the trust; and they provide that a person who neglects any of these duties without sufficient excuse, shall forfeit ten dollars for each month he so neglects, after said thirty days, which sums may be recovered in an action on the case by any persons having an interest in the will.

The duty imposed upon an executor is purely statutory, and his refusal or neglect to perform that duty is an offence created by statute. The same statute provides by whom the action shall be brought, fixes the time within which it shall be brought and prescribes the penalty.

A reference to other sections of the statute may aid us in giving effect to the sections upon which this action is founded.

Section 1987 provides that if an action, complaint, information, or indictment for a crime or misdemeanor, other than arson and murder, is commenced after the time limited in the two preceding sections, such proceedings shall be void. Those two sections fix the time within which prosecutions shall be commenced for the commission of the highest crimes. Section 1988 prescribes the time within which actions upon a statute shall be brought for a penalty or forfeiture given in whole or in part to a person who prosecutes for the same. Section 1989 fixes the time within which actions shall be commenced where the penalty is given wholly or in part to the state, county or town. Section 1990, by virtue of which this action is brought, reads:

“Actions upon a statute, for a penalty or forfeiture given in whole or in part to the party aggrieved, shall be commenced within four years after the commission of the offence, and not after.”

Section 1992 requires that, when a complaint, information, or indictment is exhibited, the clerk of the court or magistrate shall make a minute thereon of the day, month and year when it was exhibited, and the next section makes the same requirement in respect to actions brought under that chapter.

We cite these sections of the statute to show that substantially the same requirements are made in respect to the time when prosecutions by indictments and informations and actions to recover penalties shall be commenced. As in the case of crime the statute begins to run at the time of the commission of the offence.

Judgment of the county court, sustaining the demurrer to the replication and adjudging the replication insufficient, affirmed and cause remanded.

STATE v. GILMORE.

October Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 24, 1908.

Criminal Law—Intoxicating Liquors—Illegal Sale by Servant of Licensee Against Latter's Instructions—Effect as to Licensee.

Where police legislation penalizes an act or omission that might otherwise be done or omitted without culpability, intention is not an element of the offence, and ignorance of the fact or state of things contemplated by the statute will not excuse its violation.

A person duly licensed to sell intoxicating liquors under No. 115, Acts 1904, was personally guilty of selling intoxicating liquor without authority, where, in his absence, without his knowledge, and against his express instructions, his bartender sold such liquor to a minor in violation of said act.

INFORMATION for selling and furnishing intoxicating liquor without authority. Heard on an agreed statement of the facts, at the March Term, 1907, Franklin County, *Haselton, J.*, presiding. Judgment, guilty. The respondent excepted. The opinion fully states the case.

Elmer Johnson and *Lee S. Tillotson* for the respondent.

A master is not liable for the criminal acts of his servant, unless done with the master's knowledge or by his instructions. 1 Bish. New Cr. Law, §218. "But if the sale of liquor is made by the servant without the knowledge of the master and really in opposition to his will, and in no way participated in, approved or countenanced by him, he ought to be acquitted." *Com. v. Nichols*, 10 Met. 259; *Com. v. Putnam*, 4 Gray 16; *Com. v. Briant*, 142 Mass. 463; *Com. v. Stevenson*, 142 Mass. 466; *Com. v. Rooks*, 150 Mass. 59; *Com. v. Stevens*, 155 Mass. 291; *Com. v. Hayes*, 145 Mass. 289.

F. S. Tupper, State's Attorney, for the State.

In cases of this kind criminal intent is not essential, and *qui facit per alium facit per se*. *Rex v. Dixon*, 4 Campb. 12; *State v. Mead*, 75 Vt. 438; *Rix v. Medly*, 6 Currington & Payne, 292; *U. S. v. Gooding*, 12 Wheat. 472; *Rex v. Almon*, 5 Burrow 2686; *State v. Dow*, 21 Vt. 484; *State v. Hartfiels*, 24 Wis. 60; *Com. v. Boynton*, 2 Allen 160; *People v. Roby*, 52 Mich. 577; *State v. Tomassi*, 67 Vt. 312; 3 Greenl. Ev. §21; *State v. Kittelle*, 28 Am. St. Rep. 698; 17 Am. & Eng. Enc. 387.

TYLER, J. Information for selling intoxicating liquor without authority. Section 20, Act No. 115, passed in 1904, reads: "No person shall furnish, sell, expose or keep for sale any intoxicating liquor except as authorized by this act; * * * ." Condition five of section 23 is:

"That no liquor shall be sold or furnished to a minor for his own use or the use of any other person, nor to an habitual drunkard; * * * *."

[The case comes to this Court upon an agreed statement of facts signed by the state's attorney and the respondent. The material facts are that the respondent on Dec. 24, 1906, was the holder of a first-class license to sell intoxicating liquors under said act; that on that day a minor purchased intoxicating liquor of one of his employees, paid him for it and drank it in his presence on the premises; that the liquor sold was taken from the respondent's stock of liquors kept by him for sale under his license; that the respondent was not upon the premises at the time of the sale, had no knowledge of it, did not authorize it nor approve of it, but, on the contrary, had previously instructed all his employees not to sell to minors or drunkards or in any manner violate the conditions of his license.]

The question is whether the act complained of was, in law, the respondent's act, when committed by his servant. The State contends that the respondent is answerable for the act in accordance with the maxim, *Qui facit per alium facit per se*. The respondent claims that, as the sale was made without his knowledge and contrary to his instructions, the employee alone is liable.

Intent is not an essential ingredient of the offence charged. *State v. Tomassi*, 67 Vt. 312; *State v. Perkins*, 42 Vt. 399; *State v. Ackerly*, 79 Vt. 69, 64 Atl. 450. In *State v. Savery*, 145 Mass. 212, the respondent sold an intoxicating liquid by mistake; *held*, that his belief that it was not intoxicating was no defence. The rule is, where a statute commands that an act be done or omitted, which, in the absence of such statute might be done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation.

In some jurisdictions, licensees have been held criminally liable upon the ground that, intention not being an essential element of the offence, the principal is bound by the acts of his agent in violation of law while pursuing his ordinary business as such agent. Other courts and law writers hold that to render the principal liable his authority to his agent to commit the act must be shown. In 2 Bish. Stat. Crimes, §1049, the rule is stated

thus: "A sale by one acting as clerk or other agent of the defendant must appear also to have been authorized by him. If he was present, the authority will ordinarily be inferred; if absent, it may be presumed from the circumstances and other proofs. The mere fact that the person making the sale was the defendant's clerk in a lawful business is not enough; for an authorization to do what is lawful is not an authority to commit a crime. Within this principle, if the clerk or bartender of a licensed retailer, whom the law forbids to sell to minors and drunkards, makes such sale in his absence, he cannot be punished without some evidence indicating his consent to what is thus unlawful." In support of the rule the writer cites cases from Maine, New Hampshire, Indiana, Texas, Alabama and Minnesota, but admits that in some of the states the contrary rule prevails.

It was held in *Com. v. Nichols*, 10 Met. 259, that the defendant was not liable criminally as a seller when the sale proved was by a servant, without his knowledge, in opposition to his will and which was in no way participated in, approved, or countenanced by him. This doctrine is reaffirmed in *Com. v. Wachendorf*, 141 Mass. 270; *Com. v. Briant*, 142 Mass. 463; *Com. v. Hayes*, 145 Mass. 289; *Com. v. Rooks*, 150 Mass. 59; *Com. v. Stevens*, 153 Mass. 421.

In Missouri the statute forbade any dramshop keeper, druggist, or merchant selling to an habitual drunkard after notice, and it was held in *State v. Shortell*, 93 Mo. 123, that it did not warrant the conviction of a person for the act of his servant done in violation of his express directions. And in *Anderson v. State*, 22 Ohio 305, where the statute contained the words, "person or persons, by agent or otherwise," it was held that a sale to a minor by a clerk, without the principal's authority and against his expressed directions did not make the principal liable.

Decisions of courts of last resort in other states might be cited to illustrate the rule laid down by Bishop, but the foregoing are sufficient for the purpose. We will briefly refer to some of the cases that hold a different doctrine.

In *State v. Kittelle*, 110 N. C. 560, the Court said that the licensee is bound to know that sales are made only to proper persons, and to this end he must employ persons whom he can

trust; that he puts the employee in his place and gives him authority to make sales of liquor for his benefit, and should be responsible for the employee's acts.

In *McCutcheon v. The People*, 69 Ill. 606, the Court said it was immaterial whether the sale was made by the respondent or an agent, and that if made by an agent, the presumption is conclusive that he acted within the scope of his authority. "When the agent * * * is set to do the very thing which, and which only the principal's business contemplates, namely, the dispensing of liquors to purchasers, the principal must be chargeable with the agent's violation of legal restrictions on that business. His gains are increased, and he must bear the consequences. The fact that he has given orders not to sell to minors only shows a *bona fide intent* to obey the law, which all the authorities say is immaterial in determining guilt." The Court further reasoned that, as intent was not an ingredient in the offence, it logically followed that it was immaterial whether such orders were given or not; that he who does by another that which he cannot lawfully do in person must be responsible for the agent's act; that in fact it is his act; that by setting up another to do his work while he occupies himself elsewhere he cannot take the benefit of the agent's sales and escape the consequences of the agent's conduct. *Noecker v. People*, 91 Ill. 494, is to the same effect. This rule is held in *Mogler v. State*, 47 Ark. 110; *Sneider v. State*, 81 Ga. 753; *Whitton v. State*, 37 Miss. 379; *Carroll v. State*, 63 Md. 551; *State v. Hartfiels*, 24 Wis. 60, and doubtless in other states the decisions of whose courts we have not examined.

People v. Roby, 52 Mich. is cited by the Court in the N. Carolina case as sustaining the rule there contended for, the opinion having been delivered by Chief Justice Cooley. The case arose under a statute requiring that all saloons and other places where liquors were kept for sale should be closed on Sunday. The respondent's saloon was opened on a Sunday morning for cleaning, when a person went in and obtained liquor of the clerk. The respondent was not present but was in the house. The Court said that the penalties of the statute were denounced against the person whose saloon was not kept closed, and that no other fact was necessary to complete the offence. There was no evidence that the respondent assented

to the room being opened, or desired it, nor was there evidence to the contrary. No instruction to the clerk not to open it was shown.

City of Paducah v. Jones, decided by the Court of Appeals of Kentucky, Oct. 1907, reported in Vol. 104, page 971, S. W. Rep. is, in its facts, like the Michigan case. The action was brought by the city upon a bond given by the respondent as a licensee to keep a coffee house and sell spirituous liquors therein, conditioned that he would observe the laws of the state and the ordinances of the city, one of which prohibited the sale of liquors on Sunday. Sales were made during the licensee's absence by his bartender and the licensee was held liable on his bond. The Court quoted from Judge Cooley's opinion in *People v. Roby, supra*, where he said: "Many statutes which are in the nature of police regulations, * * * impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."

The Court then reasoned that if a criminal intent were necessary to constitute the offence of selling liquor on Sunday, or to a minor, or otherwise in violation of law, it would follow that the employer who had directed his clerk not to sell, or if the sale were made without his knowledge or consent, could not be criminally liable, as the criminal intent would be wanting. But in that case a police regulation had been violated, and the intent was wholly immaterial; that it was the act that the law looked at and not the intention of the perpetrator; that the character of the business carried on by retail dealer in spirituous liquors and the temptation offered by it to violate the law render it peculiarly appropriate that the rule be applied to those engaged in the traffic. The Court further said that when a person obtains a license to sell liquor, and for his own convenience and advantage employs other persons to conduct the business for him, he will be charged with responsibility for their acts and cannot shield himself upon the ground that their acts were contrary to his wishes, or in disobedience of his commands; that he assumes the risk of their acts in the business for which he employs them; that he must see to it that they do not violate the law if he would save himself from liability. The fact is emphasized that the employer has

placed it within the power of his clerk to observe or disobey the law; that he has left it to his discretion and judgment. The Court said that when he took his license, employed clerks and took the benefit of their illegal sales, he could not escape liability upon the ground that he did not approve or authorize their acts; that the duty of observing the law imposed by the acceptance of the license attaches to all persons who by employment of the licensee conduct the business under it; that their offence is his offence; that the law looks to the person intrusted with the authority and not to the subordinates he has seen fit to employ.

It should be stated that in most of the states where the decisions last cited were rendered the statutes differed from our own. In *State v. Kittelle* stress is laid by the Court upon the fact that the statute of North Carolina prohibited dealers in intoxicating liquors "to sell directly or indirectly" to minors. In Illinois the language is, "any person or persons by agent or otherwise." In Georgia the statute is that "no person, * * * by himself or another, shall sell," etc., and in *Dudley v. Seuthbine*, 49 Ia. 650, the Court said that the statute expressly provided that a principal should be liable for sales made by his agent, the statute declaring it unlawful for any person, by agent or otherwise to sell, etc. The statute of Maryland, under which the decision in *Carroll v. State* was rendered, is like ours. In Wisconsin the prohibitive words are, "knowingly or wilfully" sell to minors. In W. Va. the statute under which *State v. Denoon*, 31 W. Va. 122, was decided provides that a sale of liquor by one person for another shall be deemed to be a sale by both and that both may be indicted and fined, either jointly or separately, and the Court, while admitting a diversity of decisions upon this subject, based its opinion upon the statute referred to.

(We have referred quite extensively to decisions of other courts to show the diversity of views entertained by them upon this question. In deciding this case we must consider that it was the intention of the Legislature, when it enacted the license law, to prohibit and prevent the sale of liquors to minors and drunkards, as it was the purpose of the Michigan and Kentucky Legislatures to prevent saloons being opened on Sundays. Judge Cooley said that no other fact was necessary to complete the

offence than that a saloon was open on Sunday; that the licensee could not be heard to say that it was opened by his employee in his absence and without his knowledge. The act aimed at can be committed only by reason of a license having been taken by the respondent. Sections 13, 14 and 15 of the license law carefully provide for the selection of licensees in whom confidence can be placed. A licensee cannot be excused from criminal liability if he sells to a minor however great the imposition practiced upon him by the person obtaining the liquor. Then can he delegate the conduct of the business to an agent with instructions not to sell to minors or drunkards and himself escape liability if his agent violates the law? We hold that he cannot. The offence is complete when such sale has been made under and by virtue of the license and in the line of the respondent's business as licensee, and it is immaterial whether the act was done by the licensee himself or by his employee. When he engaged in the business he assumed all the risk of his employees violating the condition of his license. Their acts were his acts when done in carrying on the licensed business.]

Judgment that there was no error in the proceedings. Let execution of the sentence be done.

W. F. PARKER & SON v. R. N. CLEMONS.

Special Term at Rutland, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 24, 1908.

General Assumpsit—Common Counts—Account Stated—Nature and Scope—Assumpsit on Promise to Pay Damages Due to Tort—Not Maintainable.

All the common counts are founded on implied promises to pay money in consideration of antecedent debts.

An account stated is confined to matters of debt and credit, or demands in the nature of debt and credit, for which one party is responsible to another in contract, express or implied.

The facts that certain of plaintiff's goods were damaged by defendant's negligence; that, when told that the goods would have to be sent away for repairs, defendant promised plaintiff to pay the damage when its amount was ascertained, and later, when presented with the bill for repairs, promised plaintiff to pay it, disclose a liability in tort only, and do not render defendant liable in general assumpsit in the common money counts.

GENERAL ASSUMPSIT in the common money counts. Plea, the general issue. Trial by court at the March Term, 1907, Rutland County, *Waterman, J.*, presiding. Judgment for the plaintiffs. The defendant excepted. The opinion states the case.

Lawrence & Lawrence and *B. L. Stafford* for the defendant.

"No one can consistently claim that under the general count for money had and received a recovery may be had for the use and occupation of lands, or that under a general count for goods, wares, and merchandise a recovery may be had for money paid, laid out and expended." *Wertheim, Admx. v. Fidelity & Casualty Co.*, 72 Vt. 326; *Beech v. Dorwin*, 12 Vt. 139; *Estabrook v. Fidelity Mut. Fire Ins. Co.*, 74 Vt. 202.

William H. Preston for the plaintiffs.

A compromise or settlement of a disputed claim or controversy, made *bona fide*, is a good consideration for a promise, though it should ultimately appear that the claim was wholly unfounded. *Brandon v. Jackson*, 74 Vt. 78; *Bellows v. Sowles*, 55 Vt. 391; *Grandin v. Grandin*, 9 Atl. 756.

TYLER, J. Assumpsit with common counts; plea, the general issue. It appeared by an agreed statement of facts that the defendant was manager of a telephone company and was engaged, with an assistant, in wiring a business block in Fair Haven; that while so engaged the assistant, in the defendant's

absence from the room, accidentally overturned a jar of chemical fluid; that the fluid ran out, leaked through the floor into the plaintiff's jewelry store and injured various articles therein. The defendant was not employed by the telephone company, but was in charge of the work at the request of the son of the owner of the block, and the assistant was also employed by him. When the plaintiff discovered the injury to his goods he sent for the defendant, showed them to him and informed him that part of them would have to be sent away to be repaired. The defendant then promised the plaintiff that he would pay him the amount of the damage when he ascertained what it was. The plaintiff had the goods repaired, showed the bill therefor to the defendant, who at first agreed to pay it, but afterwards refused unless the owner of the block would pay one-half, which the latter would not do.

No question was made in the argument other than whether a recovery could be had under any of the common counts.

It is clear that the "work and labor performed" upon the goods were for the plaintiff and not for the defendant, and the same is true in respect to "money laid out and expended." Indeed, all the common counts are founded on express or implied promises to pay money in consideration of antecedent debts.

This case does not fall within either of the first three divisions made in the text-books,—*indebitatus assumpsit*, *quantum meruit*, or *quantum valebant*. The plaintiff contends that the count for an account stated will lie, but we think that his demand does not fall within the definition of an account. It was said by Chief Justice Shaw in *Whitwell v. Willard*, 1 Metc. 216, that the primary idea of account *computatio*, is some matter of debt and credit, or demands in the nature of debt and credit, between parties; that it implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation. It is doubtless true, however, that it would be sufficient to come within the definition if the accounts were all on one side, provided the amount were agreed to by the parties. *Langdon v. Roane's Admr.*, 41 Am. Dec. 60 and note.

The form adopted by Chitty and ever since followed is that, "the defendant accounted with the plaintiff of and concern-

ing divers sums of money before then due from the defendant to the plaintiff and then in arrear and unpaid, and that upon such accounting the defendant was found to be in arrear to the plaintiff in a named sum, and that being so found in arrear and indebted, the defendant in consideration thereof undertook and faithfully promised," etc., and the allegation of the breach in this as in the other common counts is: "Yet the defendant, not regarding his said promises, * * * , hath not, although often requested, as yet paid said sum of money," etc.

Bouvier defines "account stated" as an agreed balance of account. It was held in *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93, that an account stated is an account balanced and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance. See, also, 2 Ency. Pl. & Pr. 1024.

We also refer to some of the earlier authorities. It is said in 1 Saund. Pl. & Ev. 5th ed., page 47, in respect to a recovery upon this count, that it must be proved that the account was "of money or a debt." It is also there said that an account stated does not alter the nature of the original debt. It was held in *Knowles v. Mitchell*, 13 East 249, that an admission by the defendant that a certain sum was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, would support a count upon an account stated. It was decided in *Whithead v. Howard*, 5 Moore 105, cited in Saunders, that a recovery could not be had upon this count because there was no existing antecedent debt due from the defendant to the plaintiff. *Willis v. Jernegan*, 2 Atk. 251; *Peacock v. Harris*, 10 East 106.

If the defendant in the present case was primarily liable to the plaintiff it was in an action of trespass on the case for a tort. The damages consequent upon the wrongful act were not a proper subject of book account and were not treated as such by the plaintiff. He paid for the repairs and took receipted bills for such payments.

The plaintiff relies upon this sentence in the opinion in *Powers v. Insurance Co.*, 68 Vt. on page 396, 35 Atl. 333, "It is unnecessary, in order to support this count, (account stated) to show the nature of the original debt, or prove the specific

items constituting the account, but it must appear that at the time of the account a certain claim existed, of and concerning which an account was stated." That the Court was not considering the right of a party to recover for a tort in an account stated is apparent from the fact that the plaintiff in that case was seeking to recover upon an insurance contract and an amount that he claimed had been agreed upon.

Bradley v. Phillips, 52 Vt. 517, is distinguishable from the present case. There the parties, being owners of adjoining lands, each had cut logs over the line on the other's land. They settled by an agreement that each should pay the other at specified rates for the logs taken, and the plaintiff had paid the defendant. But the latter, though having taken the property and having promised to pay for it and having induced the plaintiff to pay for what he had taken, refused to pay the plaintiff. The Court held that the question was one purely of contract; that the defendant's agreement was to pay the plaintiff for what logs he had taken; that nothing remained for him to do but pay over the money, and that the plaintiff could recover upon the common counts. The defendant's liability was the same as if he had bought the logs and promised to pay the plaintiff for them. The parties, in legal effect, waived their respective claims for torts, settled their claims and promised to pay each other the sums agreed upon for the logs each had taken, whereupon each became the other's debtor. In the case before us the defendant did not become the plaintiff's debtor, and upon the authorities he cannot recover upon the count for an account stated.

Judgment reversed and cause remanded.

STEPHEN FURRY'S ADMR. v. GENERAL ACCIDENT INSURANCE CO.

January Term, 1908.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 30, 1908.

Accident Insurance—Construction of Exception in Policy—"Influence" of Intoxicants—Finding of Facts—Construction.

An exception of uncertain import in an insurance policy is to be construed most strongly against the insured; but a simple, plain, and unambiguous exception should not be abridged by construction.

The exception in an accident insurance policy limiting the liability of the insurer if loss occur "while under the influence of any intoxicant or narcotic," requires the insured so to limit his use of intoxicants and narcotics as to retain the full control of his mental and physical powers, and is not an unreasonable requirement.

In an action on an accident insurance policy where it appeared that during the evening preceding the accident the insured was more or less under the influence of some intoxicant, and that shortly before the accident his actions indicated that he was "getting sobered off," the finding that at the time of the accident he was not under the influence of intoxicating liquor "so as to prevent him from being fairly able to take care of himself" leaves him under that influence to some extent, and so within the exception of the policy limiting the insurer's liability if loss occur "while under the influence of any intoxicant or narcotic."

GENERAL ASSUMPSIT on an accident insurance policy. Plea, the general issue. Trial by court at the September Term, 1907, Rutland County, Hall, J., presiding. Judgment for the plaintiff to recover the larger sum mentioned in the policy. The defendant excepted. The opinion states the case.

E. H. O'Brien and Charles L. Howe for the plaintiff.

A person not under the influence of any intoxicant or narcotic so as to prevent him from being fairly able to take care of himself is not within the conditions of the policy. *Manufacturers Accident Indemnity Co. v. Dorgan*, 58 Fed. 952; 4 Cooley, Ins. 3204. Exceptions of this kind are construed most strongly against the insurer. *Fidelity & Casualty Co. v. Chambers*, 40 L. R. A. 432.

Among the facts found and reported by the court touching deceased's condition in respect to being under the influence of any intoxicant or narcotic, it appears that "the evidence was very conflicting; some of the witnesses testifying to actions indicating intoxication and others that they did not observe such actions. Some testified that he was intoxicated, and others that he was not." Such being the fact, it would not be error on the part of the court to find either way. Error will not be presumed. *Clary v. Willey*, 49 Vt. 55; *Ainsworth v. Hutchins*, 52 Vt. 554; *State v. Brunell*, 57 Vt. 580; *Spaulding v. Warner*, 57 Vt. 658; *Burton v. Est. of Marlowe*, 55 Vt. 434.

Butler & Moloney for the defendant.

MUNSON, J. Plaintiff's intestate was insured in the defendant company under a contract which limited the company's liability to one-fifth of the amount otherwise payable, if the loss was "from exposure to obvious risk of injury or obvious danger," or "while under the influence of any intoxicant or narcotic." It is found that "the accident did not occur from exposure to obvious risk of injury or obvious danger." This is conclusive as to the first exception, unless it can be said as matter of law that walking on a railroad track unnecessarily is in itself such an exposure,—as to which we do not find it necessary to inquire. The findings bearing upon the second exception are with reference to some intoxicant or narcotic, without determining which. For brevity, we shall speak of the case as one of intoxication.

It is found that during the evening preceding his injury the insured was more or less under the influence of some intoxicant or narcotic. Between eleven and twelve o'clock he went to a hall where a fair was being held, and his condition was then

such as to justify the managers in preventing his entrance. He was last seen in the village between twelve and one o'clock, and his actions and conversation at that time indicated that he was "getting sobered off." Soon after this he went to the railroad yard, lighted his lantern and started south on the track. Several persons saw him as he started, and watched him for some distance. His gait was somewhat unsteady, but he was walking between the rails. It was about a mile and a half to the place where he was injured, and in this distance there were two bridges without any planking on the ties. He was found early in the morning, sitting a few feet west of the track. His left foot had been cut off just above the ankle, and was lying inside the rail. The trains passed Danby that night at 12:49 and 1:32.

The concluding finding is that at the time the accident occurred the insured was not under the influence of intoxicating liquor "so as to prevent him from being fairly able to take care of himself." This leaves him under the influence of liquor to some extent, and measures the extent of the influence by the advance made in the recovery of his faculties. It is saying in effect that the influence of the liquor had so far passed away that he had become fairly able to take care of himself. The effect of the finding must depend upon the force given to the word "fairly." It is evident that the word is not used here in the sense of "fully," but rather in the sense of "measurably" or "reasonably." See Century Dict. The clause containing it certainly cannot be construed as a finding that the insured had regained the normal use of his faculties. The word, although capable of other uses, is ordinarily used as a word of limitation. In *Warner v. Arctic Ice Co.*, 74 Me. 475, there was a question regarding the phrase "fairly merchantable quality," and the Court considered that the word "fairly" was well adapted to convey the idea of mediocrity in quality, or something just above it.

The only case we know of where the words in question were used is *Manufacturers' Accident Indemnity Co. v. Dorgan*, 7 C. C. A. 581. This case was submitted with an instruction which contained the expression "fairly able to take care of himself prudently and properly," but the objection to the instruction and the evidence in the case were not such as required a consideration of this language, and nothing was said regarding it. We find nothing in the other cases brought to our attention that bears

upon the precise question presented. In the cases cited below, although there was evidence of drinking or of conduct that might indicate it, and varying comments of the reviewing Court, there was in each instance a distinct finding of the triers that the insured was not, at the time of the accident, in the condition described in the exception,—with no report of instructions limiting its effect. *Fidelity and Casualty Co. v. Chambers*, 93 Va. 138; *Travelers Ins. Co. v. Harvey*, 82 Va. 949; *Prader v. Natl. Masonic Accident Asso.*, 95 Iowa 149; *Sutherland v. Standard etc. Ins. Co.*, 87 Iowa 505.

The exception under consideration is one that materially affects the risk. It is manifestly intended to require the insured to so limit his use of liquor that he will retain "full control over his faculties of mind and body." *Shader v. Ry. Passengers' Assurance Co.*, 3 Hun. 424; *Standard etc. Ins. Co. v. Jones*, 94 Ala. 434. It is considered by no means unreasonable that the company should require that the insured be under no exciting influence that may affect his self possession or judgment in the exercise of the faculties essential to his safety. *Shader v. Ry. Passengers' Assurance Co.*, 66 N. Y. 441; *Campbell v. Fidelity and Casualty Co.*, 109 Ky. 661.

If the plaintiff's intestate had not recovered the full use of the mental and physical powers available for his protection when in normal condition, he was still "under the influence" of liquor within the meaning of the exception. It is doubtless true that an exception of uncertain import is to be construed most strongly against the company. But a plain, simple and unambiguous provision, which points clearly to a just and practicable criterion, is not to be so construed as to deprive the company of the protection for which it stipulates. If it be conceded that there may be a recovery notwithstanding some impairment of the faculties from the immediate effect of drink, it is difficult to see upon what theory the courts can fix the limit that shall bar recovery.

Judgment reversed, and judgment for the plaintiff for the smaller sum.

MARY E. LINCOLN v. NANCY HEMENWAY.

Special Term at Brattleboro, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed February 1, 1908.

Assumpsit—Evidence—Poverty of Alleged Creditor and Known Financial Ability of Alleged Debtor—Extent of Cross-Examination Thereon—Negative Testimony—Discretion of Trial Court.

In an action of assumpsit where the issue was whether plaintiff, as she claimed, when not indebted to defendant loaned her \$800, taking no note, or whether, as defendant claimed, the loan was only \$600, evidenced by her note on which was indorsed, with plaintiff's consent, about \$200 that plaintiff then owed defendant for services rendered during the three or four preceding years, plaintiff was entitled to show that during the time in which defendant claimed her account accrued, plaintiff, to defendant's knowledge, had ample financial means, and defendant was in pressing need of money.

Defendant, in cross-examination, having denied successively that, during the time in which she claimed her account for services accrued, she was in needy circumstances, or was aided by charity, or that a certain church gave a "pound party" for her benefit, plaintiff's witness was properly allowed to testify that, during the time in question, that church did aid defendant by what was called a "pound party," because a pound of something was contributed by each person present, and that the several contributions were collected and sent to defendant's house; although it appeared that the gifts were delivered in her absence, and it did not appear that she had any knowledge of the "pound party" till after the gifts were so delivered.

Since defendant denied that she was needy during the time in question, the cross-examiner was entitled further to inquire of her concerning matters within her knowledge that might fairly be taken to indicate the contrary, without being bound by her answers; and her denial of such matters made the fact of their

existence relevant, as bearing on her credibility as a witness in respect of her general financial condition, regardless of their exact character as ultimately ascertained.

Plaintiff's witness having testified that during the time in which defendant claimed her account for services accrued, the witness lived opposite defendant, often visited her, was acquainted with her condition and knew she was poor, it was not error to allow the witness further to testify that on one occasion during that time defendant told her "that it was very hard for them to get along."

It being important, as bearing on the validity of defendant's account, to determine whether plaintiff's injury, due to a fall from a bicycle, occurred in April, as defendant testified, or in August or later, as plaintiff testified, it was not error to allow plaintiff's witness to testify that she lived near plaintiff's house, had known her very well for years, and that she did not hear of the injury till the latter part of August.

The testimony of a witness that he did not hear, or did not know, of an event the occurrence of which is disputed, is admissible only when the circumstances are such that he probably would have heard or known of it soon after it occurred; and the requisite degree of that probability is in the discretion of the trial court.

GENERAL ASSUMPSIT. Pleas, the general issue and offset. Trial by jury at the April Term, 1907, Windham County, *Taylor, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion sufficiently states the case.

Waterman & Gibson, and *J. K. Batchelder* for the defendant.

To find from the "pound party" transaction that defendant was then in need, it must first be presumed that the contributors had knowledge of defendant's condition, and then it must be presumed that such condition was that of financial distress. A presumption cannot be based on a presumption. *Hammond's Admr. v. Smith*, 17 Vt. 231; *U. S. v. Ross*, 92 U. S. 283; *Richmond v. Aiken et al.*, 25 Vt. 324; *Doolittle et al. v. Holton*, 26 Vt. 588; *McLear v. McMurray*, 58 Pa. St. 126; *Pass. Co. v. Henrice*, 39 Am. Rep. 699; 22 Eng. & Am. Enc. of Law, 1236.

It was error to admit the testimony of Mrs. Wood that defendant told her "that it was very hard for them to get along." There is nothing to show to what this referred. It might have referred to sickness, incompatibility of temper or bad neighbors. *Noyes v. Fitzgerald*, 55 Vt. 49; *Aiken v. Kenison*, 58 Vt. 665; *Harris v. Howard's Est.*, 56 Vt. 695; *Phelps v. Conant*, 30 Vt. 277; *Walworth v. Barron*, 54 Vt. 677.

Herbert G. Barber and Frank E. Barber for the plaintiff.

In the circumstances of this case, evidence that defendant was poor and in need of money was admissible. *Stone v. Tupper*, 58 Vt. 409; *Beckley v. Jarvis*, 55 Vt. 348; *Kimball v. Locke*, 31 Vt. 683; *Wigmore on Ev.* §§89, 224; *Strong v. Slicer*, 35 Vt. 40.

The testimony of Mrs. Whittier that she did not hear of plaintiff's injury till the last of August was properly admitted. *Weeks v. Lyndon*, 54 Vt. 640; *Hill v. North*, 34 Vt. 604; *Wigmore on Ev.* §§416, 730, 1791.

MUNSON, J. The plaintiff claimed that she loaned the defendant eight hundred dollars in October, 1899, for which no note was taken, and that she was owing the defendant nothing at that time. The defendant claimed that the sum loaned was six hundred dollars, and that she gave a note for that amount; but that the plaintiff was then owing her nearly two hundred dollars for services rendered during the three or four preceding years, and that two indorsements representing this indebtedness were made on the note, with the plaintiff's consent, at the time it was given. The defendant produced what purported to be a copy of such note and indorsements, and two books containing charges aggregating the amount indorsed.

As tending to discredit the defendant's claim, the plaintiff was entitled to show, by proper evidence, that she had ample means of payment to the defendant's knowledge, and that the defendant was in pressing need of money, during the time in which the account was claimed to have accrued. *Strong v. Slicer*, 35 Vt. 40; *Stone v. Tupper*, 58 Vt. 409; *McDowell v. McDowell's Est.*, 75 Vt. 401.

In connection with evidence of the plaintiff tending to establish these facts, and for the purpose of proving the defendant's poverty, the defendant was asked in cross-examination, with reference to the period in question, if she was not in needy circumstances, if she was not aided by charity, and if the Methodist church did not have a "pound party" for her benefit; which questions, put separately and successively, were answered in the negative.

The plaintiff then introduced a witness who testified under exception that the Methodist church once aided the defendant financially by what was called a "pound party,"—in which a pound of something was contributed by each member participating, and the several contributions were collected and sent to her house. It appeared that the gifts were delivered in her absence, and it did not appear that she had any knowledge of the "pound party" until after they were delivered.

It is urged by way of objection to this evidence that such donations are frequently extended to and accepted by persons who are not in actual need, and that the persons who contributed on this occasion may have done so for other reasons than the defendant's poverty, or from a mistaken understanding regarding her condition. We think these suggestions fail to meet the question actually presented.

The witness was the party, and the matters inquired about were within her personal knowledge. She was subject to cross-examination regarding her financial condition, and the questions asked all related to that condition. The examiner was entitled to pursue a line of inquiry calculated to secure an admission of her need. If she denied that she was needy, he could inquire of her concerning matters that might fairly be taken to indicate the contrary without being bound by unfavorable answers. Her denial of such a matter would make the fact of its existence relevant, regardless of its exact character as ultimately ascertained. The question here is not whether the testimony of the contradicting witness covered all the elements necessary to make the transaction admissible as independent evidence. The defendant had denied that there was any such occurrence. The contradiction of that statement bore upon the question of her credibility in a matter directly involved in the general inquiry. If her denial of the particular occurrence was false, that afforded

sufficient ground for an inference that she had testified falsely as to her general condition.

Mrs. Wood, a witness for the plaintiff, testified that she lived opposite the defendant and often visited her, that she was acquainted with her circumstances and knew she was poor, and that on one occasion she had a conversation with defendant in which defendant told her "that it was very hard for them to get along." It is urged that this expression might have referred to various difficulties other than poverty, and was too indefinite to be admitted. The evidence which led up to the statement complained of indicates a conversation regarding straightened circumstances; the expression testified to is one often used with reference to an embarrassment of that nature; and the possibility of its having meant something else affords no ground for an adjudication of error.

The plaintiff was once injured by falling from a bicycle. Defendant claimed this was in April. Plaintiff claimed it was in August or later. The question was important for its bearing on the validity of defendant's account. The plaintiff, in corroboration of her own testimony on this point, introduced Mrs. Whittier, who testified that she lived near plaintiff's home and had known her very well for years, and that she did not hear of her injury until the latter part of August. Evidence of this character is admissible when the circumstances are such that the witness would probably have heard of the event soon after it occurred. It is not admissible unless there is this probability. The degree of the probability must necessarily be left largely to the discretion of the trial court. While the showing of circumstances indicating the probability in this instance is slight, we cannot say that the admission of the evidence was legal error.

Judgment affirmed.

MARTHA M. HALL v. AUGUSTA LAWTON ET AL.

January Term, 1908.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed February 3, 1908.

Wills—Construction—Jurisdiction of Chancery—No. 40, Acts 1896.

The court of chancery will not take jurisdiction, under No. 40, Acts 1896, of a bill for the construction of a will, brought by a devisee pending her appeal from the probate court's final decree of distribution involving that question.

APPEAL IN CHANCERY, Windsor County. Heard at Chambers, September 3, 1906, on the pleadings and master's report, *Miles*, Chancellor. Decree dismissing the bill with costs to the defendants. The oratrix appealed. The opinion states the case.

Davis & Davis, and *George L. Fletcher* for the oratrix.

Stickney, Sargent & Skeels for the defendants.

ROWELL, C. J. This is a bill in chancery for a construction of the will of the oratrix's husband, by which certain real estate is devised to her, "her heirs, viz., her children and grandchildren and assigns." The will was duly proved, and the oratrix and another appointed executors. They accepted the trust, settled the estate, rendered their account, and a final decree of distribution was made, whereby the real estate devised to the oratrix was given to her "during her natural life, and at her decease," to the defendants "and their heirs and assigns forever." Two of the defendants are the only children the testator left; and the other, the only grandchild. The decree was made as the parties hereto agreed it should be, and no question concerning it was submitted to the probate court for its decision as a controverted matter. But the oratrix did not fully understand and comprehend the language of the decree, nor its legal

force and effect, nor the precise title and estate that it gave her. Having taken counsel after the decree was made, she came to think that the fee ought to have been given to her, and so she appealed to the county court, where the case is still pending, its further prosecution having been enjoined in this suit.

The oratrix claims that under No. 40, Acts of 1896, it was the duty of the court of chancery, and is the duty of this Court, to construe the will. But as that statute was construed and applied in *Harris v. Harris*, 79 Vt. 22, 64 Atl. 75, this claim cannot be sustained, in the circumstances. There, at the time the bill was brought, the estate was nearing final settlement and distribution in the probate court; and because any one interested in the decree of distribution could appeal therefrom to the county court, from which the case could be brought to this Court on exceptions, it was held that there was no occasion for the intervention of chancery, and the bill was dismissed. See, also, *Clark v. Peck's Executors*, 79 Vt. 275, 65 Atl. 14.

On the authority of these cases, and especially of *Harris v. Harris*,

The decree dismissing the bill with costs is affirmed, and cause remanded.

EUGENE KILEY v. RUTLAND RAILROAD CO.

May Term, 1905.

Present ROWELL, C. J., TYLER, WATSON, and HASELTON, JJ.

Opinion filed February 3, 1908.

Master and Servant—Injury to Servant—Evidence—In Performance of Duty—Contributory Negligence—Inspection of Cars by Trainmen—Rule of Company—Construction—Fellow Servants—Trainmen and Car Inspectors—Negligence—Burden of Proof—Presumptions—Exceptions to Charge—Too General.

In an action by a conductor against a railroad company for injuries received in attempting to mount a freight car in a train going six miles an hour, in consequence of the giving way of one of the rounds in the end ladder that he was climbing, evidence considered and *held* that assumption of risk, contributory negligence, and defendant's negligence in failing properly to inspect the car were questions for the jury.

Where the round of an end ladder, that a conductor was climbing in attempting to mount a freight car in his train, gave way because the wood into which it was fastened was rotten, a jury would be warranted in finding that a prior inspection of the car, made by the inspector merely walking along each side of the train and looking at the cars, the running gear, ladders, and so forth, was negligent.

The rule of a railroad company that trainmen must inspect their trains before leaving a terminal and at intervals during the trip does not require them to inspect the cars so thoroughly as do car inspectors at terminal stations; there being evidence that what trainmen did under the rule was merely to look the trucks over to see whether the connections were all right and the trucks in working order.

The fact that the duties of trainmen require them to mount moving cars is recognized by the statute that requires railroad companies to equip their cars with end ladders rather than side ladders.

In an action by a conductor for injuries received in attempting to mount a freight car in his train which was moving at the rate of six miles an hour, due to the giving way of a round in the end ladder that he was climbing, plaintiff's testimony that grabirons and stirrups were attached to cars to enable trainmen to board a train in motion, as well as one standing, tends to show that trainmen were expected to mount moving trains, and so supports the allegation of the declaration that a duty of his employment required plaintiff to mount moving trains.

A servant is not precluded from recovering for injuries received in a hazardous position that he has voluntarily and unnecessarily taken, where that hazard has in no way contributed to his injuries.

A railroad company's car inspector is not the fellow servant of the trainmen, as regards the inspection of either its own or foreign cars carried by it, but is the representative of the railroad company in the performance of a contractual duty that it cannot so

delegate as to be relieved from liability for the negligent performance thereof. *Hard v. Railroad Co.*, 32 Vt. 473, disregarded, as having been overruled.

In an action by a railroad conductor for injuries from the ladder on a car giving way as he was climbing it, although the burden of proof as to negligence is on plaintiff, there is no presumption that the ladder was sufficient.

The trial court should always know what is excepted to, and this Court should always be able to see that a question argued here was distinctly raised below.

A general exception to the charge of the court on the subject-matter of seven requests for instructions, that cover, in a more or less involved form, a large part of the law applicable to the case, was too vague and general to be available; but to reserve for review any proposition stated in the charge, a specific exception to it was needed.

CASE for negligence. Plea, the general issue. Trial by jury at the September Term, 1904, Rutland County, *Munson, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The car that plaintiff was climbing was a Boston & Maine car, and the exceptions state that: "The defendant gave evidence, which was uncontradicted, that this train of cars was inspected at North Bennington by its inspector, Howley, an inspector of long experience, who went up one side of the train and down the other side, and, among other things, examined the grabirons and ladders by looking them over, and that he saw nothing that indicated any weakness or other trouble with the ladders; that he did not get up and test the ladders with his weight or muscle and that it is not customary to do so; but that he looked to see if any signs of weakness appeared, and discovered none. Howley could not recall the inspection of a Boston & Maine car, but testified that he inspected every car that was in the train Kiley left with."

H. Henry Powers and *P. M. Meldon* for the defendant.

Attempting to mount a train going six miles an hour is negligence, as matter of law. Plaintiff had no work on the top

of the train, and his only purpose was to get into the caboose. His excuse is that the train was moving so fast that he did not dare to wait for the caboose. If that was so, he is to blame for it because he ordered the train to be set in motion. So the plaintiff's negligence defeats his right of recovery. *Harvey v. Eastern R. R.*, 116 Mass. 269; *Hunter et al. v. C. & S. V. R. R.*, 112 N. Y. 371; *Phillips Case*, 49 N. Y. 177; *Solomon v. Manhattan R. R.*, 103 N. Y. 437; *Laboy v. Mo. Pac. R. R. Co.*, 36 Fed. 879; *Hutchinson on Carriers*, §641; *Bailey, Master and Servant*, 92; *Gibson, Admx. v. Erie Railway Company*, 63 N. Y. 449; *Worthington v. C. V. R. R.*, 64 Vt. 107; *Kilpatrick v. Grand Trunk R. R.*, 72 Vt. 267.

The rule required plaintiff to inspect his train at terminal points. He had the same opportunity to discover the defect that the inspector had, and, because of the rule, was equally obligated to do so. *Alabama etc. R. R. Co. v. Carroll*, 84 Fed. 772.

There were two ways to get into the caboose; one perfectly safe, the other perfectly reckless. Plaintiff departed from the line of his duty and chose the latter, and must suffer the consequences. *Gilbert v. Bur. & C. R. Co.*, 128 Fed. 529; *Morris v. Duluth etc. Ry. Co.*, 108 Fed. 749; *Cunningham v. Chicago etc. Co.*, 17 Fed. 882; *Chicago etc. Co. v. Davis*, 53 Fed. 61.

The presumption is that Howley did his duty, and no evidence was shown that the defect in the ladder was visible, the jury must have found that the defect was latent and that Howley would have discovered it by the use of force. *Louisville etc. v. Bates*, 146 Ind. 564; *Baldwin v. Chicago etc. Co.*, 50 Iowa 689; *Louisville etc. Co. v. Williams*, 95 Ky. 199; *Thompson v. Great Northern*, 79 Minn. 291; *Ballou v. Chicago etc. Co.*, 54 Wis. 257.

The car inspector was a fellow servant with plaintiff. *Smith v. Potter*, 46 Mich. 258; *Galveston etc. R. v. Farmer*, 73 Tex. 86; *Kelley v. Abbott*, 63 Wis. 307; *Cincinnati etc. Co. v. McMullen*, 117 Ind. 439; *Neutz v. Jackson etc. Co.*, 139 Ind. 411; *Wonder v. B. & O. R. R.*, 32 Md. 411; *Dewey v. Detroit etc. R. R.*, 97 Mich. 329; *Columbus & Xenia R. R. v. Webb*, 12 Ohio St. 475; *Railroad v. Fitzpatrick*, 42 Ohio 318; *Phil. etc. R. R. Co. v. Hughes*, 119 Pa. St. 301; *Hard v. Vt. & Canada R. R.*, 32 Vt. 473; *Mackin v. Boston etc. R. R.*, 135 Mass. 201.

Butler & Moloney for the plaintiff.

By the great weight of authority, the receiving company is as much bound to inspect foreign cars as to inspect its own. *Guttridge v. Mo. Pac. R. Co.*, 94 Mo. 468; *Gottlieb v. N. Y. etc. Co.*, 100 N. Y. 466; *O'Neil v. Railroad Co.*, 9 Fed. 337; *Jetter v. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Jones v. Railroad Co.*, 28 Hun. 364; *Goodrich v. N. Y. etc. R. R.*, 116 N. Y. 398; *Mo. Pac. R. Co. v. Barber*, 44 Am. & Eng. R. R. Cas. 523; *Moon v. N. P. R. Co.*, 46 Minn. 106, 24 Am. St. 195; *Mason v. Richmond R. Co.*, 111 N. C. 482; *Fay v. Minn. etc. R. Co.*, 11 Am. & Eng. R. R. Cas. 193; *C. B. & Q. R. Co. v. Avery*, 109 Ill. 314; *L. & N. R. Co. v. Veatch*, 11 Am. & Eng. R. R. Cas., N. S. 28; *A. G. S. R. Co. v. Carroll*, 9 Am. & Eng. R. Cas. 759; *Bennett v. N. P. R. Co.*, 48 Am. & Eng. R. Cas. 182; *International etc. Co. v. Keenan*, 44 Am. & Eng. R. R. Cas. 607; *Smith v. Potter*, 2 Am. & Eng. R. R. Cas. 140 (46 Mich. 258); *Chicago etc. R. Co. v. Fry*, 131 Ind. 319.

HASELTON, J. This was an action on the case for negligence. It appeared that the plaintiff was conductor of a local freight train of the defendant which left North Bennington for Rutland, June 3, 1903, in the afternoon. The train, as made up at North Bennington, a terminal point, consisted of some twenty-two or twenty-three cars, counting the caboose and a passenger coach which were at the rear, and the length of the train was not greatly varied, though at different stations cars were set out and others were taken in. The plaintiff was injured at North Dorset, where a small amount of freight was unloaded.

At the close of the evidence the defendant moved to have a verdict directed in its favor. This motion was overruled and the defendant took an exception. The entire evidence is referred to on the questions raised by this exception.

The plaintiff's evidence tended to show that the passenger coach was behind the caboose at the very rear end of the train, was empty of passengers and had gates and "a good deal of rigging" at the rear entrance thereto. His testimony tended to show that the freight that was unloaded at North Dorset was unloaded from a car about the middle of the train; that the cars were from 28 to 40 feet in length, making the train a long one,

and leaving the rear end of the train a very considerable distance from the station; that the night was dark and the station unlighted; that all the light the plaintiff had was from his lantern; that, after the freight was unloaded at North Dorset, the plaintiff did not travel back in the darkness with his lantern to the caboose before giving the signal for starting, but that he gave, or caused to be given, the signal from the platform; that the train started, and that he then moved hastily towards the rear of the train as far as the end of the platform, which was a gravel structure; that on account of the darkness he was uncertain as to how far from him the rear end of the train was; that as the speed of the train was increasing, and as the caboose would be followed by a passenger car, he thought it might be unsafe to wait for the caboose, as he would have otherwise considered it safe to do; and that on account of the gearing of the gates at the rear end of the passenger coach, he thought he might get his hand caught if he waited for the very rear end of the train; and that therefore out of regard for his safety, as a Boston & Maine car, which proved to be the fourth car from the last, was going by at about six miles an hour, he took hold of the grabiron on the side of the car, put his foot on the stirrup below, swung himself around the end of the car to the end ladder, placed his foot on the lower round of the ladder, took hold of one of the upper rounds with his hand, was safely on the ladder, and was climbing it, when the inside end of a round which he had hold of gave way, causing him to lose his balance and fall; that he overlooked or omitted nothing in the regular process of climbing; that the speed of the train had nothing to do with the giving way of the round, and that the only thing that had anything to do with his fall was the giving way of the round in question. The plaintiff testified to long service on the defendant's road, to familiarity with its rules; that he knew the rules required him to look out for his safety; that he considered the course he took a safe one; that the way in which he proceeded was a usual and ordinary way, and that grabirons and stirrups were provided for the purpose of enabling trainmen to board a train in motion as well as to get onto one standing still. The plaintiff, though testifying that the inside end of the round gave way so that the round hung down, did not undertake to say how it gave way. He, however, called as a witness one Collins, whose

testimony, taken with other testimony, tended to show that the fastening at one end of the round pulled out, leaving splinters and rotten wood visible.

The defendant's evidence tended to show that the plaintiff was under the influence of intoxicating liquor at the time of the accident, while evidence on the part of the plaintiff tended to show that he was sober and had not been drinking. The evidence of two car inspectors of the defendant, Schryer and Taylor, tended to show that an inspection made after the accident disclosed no such condition as must have existed if the testimony of the plaintiff and Collins was true. A considerable part of the evidence of the defendant was directed to the point that the accident did not happen in the manner testified to by the plaintiff.

The car inspector of the defendant at North Bennington was one Howley, and his testimony tended to show that the inspection of the cars in the Kiley train was made by him after the train was drawn up, and was made by walking along on each side of the train and looking at the cars, their running gear, ladders and so forth. There was some evidence of an examination of some of the cars in Kiley's train before the train was made up, but there was evidence from which it could fairly be inferred that the only real inspection of the car in question was made when it was in the train as before stated. The nature of that inspection, as the testimony tended to show it, has been referred to.

The first ground of the motion to have a verdict directed for the defendant was: "That the attempt of the plaintiff to board the train in motion, as testified to by him, without any necessity then pressing upon him, but, as he says, because he had done it before safely and he supposed he could safely do it again, and whether he lost his job or not, if left behind, was negligence *per se*; and that, as matter of law on the plaintiff's own testimony in this behalf, he assumed the risk of the experiment, and could not recover damages received thereby, whether the defendant was negligent or not in respect to the condition of the ladder, and whether or not the plaintiff was under the influence of intoxicating liquor." But enough references to the testimony have been herein made to show that it cannot be said as matter of law that in no view of the evidence was the plaintiff free

from contributory negligence. There was a view of the evidence which reasonable men might take that exonerated him from contributory negligence, that was inconsistent with the claim that his manner of boarding the train was an "experiment," a view that recognized his right to be where he was when the round gave way, and that contemplated the giving way of the ladder round as the sole cause of the injury.

The second ground of the defendant's motion for a verdict was as follows: "The car claimed to have been defective, being on the plaintiff's own testimony a foreign car, the defendant owed the plaintiff the duty only of inspection by a competent inspector, and no claim is made by the plaintiff that the inspector was incompetent, except in the single instance of the inspection of the plaintiff's train in the manner above stated." No question was made but that Howley was competent, and in view of the course of the argument this statement of the second ground for the motion is treated as raising the question of whether there was evidence tending to show that his inspection in this instance was negligent. From a review of the evidence it is clear that it cannot be said as matter of law that Howley's inspection was not negligent. It appears from the evidence of the defendant that the inspection made by Howley was substantially the same as that made by the two inspectors of the company who inspected the train after the injury to Kiley and who, as they testified, found nothing wrong about the ladder or rounds. If the jury believed Kiley and Collins and also all the inspectors, they may well have found that Howley's inspection was negligent under any standard of duty whatever.

The third ground of the defendant's motion for a verdict was that Kiley, the plaintiff, did not make the inspection required of him by a written rule of the company with which he was familiar, and that by such failure he was guilty of contributory negligence, and therefore could not recover. The rule invoked is 510 of the defendant company's book of rules and reads as follows: "Trainmen must inspect their trains before leaving a terminal and at intervals during the trip." Kiley testified to the effect that what the trainmen did under the rule was to look the trucks over to see if the connections were all right, if the trucks were coupled up and in working order. His evidence tended to show that this train inspection

did not relate to the ladders, and was something different from the inspection of the cars. There is nothing unreasonable in the view that a rule which imposes upon all trainmen the duty of inspecting their trains at terminals and at intervals during a trip, is a very different duty from that imposed upon car inspectors at terminal stations, and the practical construction which Kiley testified was put upon the rule by trainmen seems to be the true one. The motion to have a verdict directed for the defendant was properly overruled. The defendant was entitled to have the case submitted to the jury under proper instructions as to contributory negligence and the assumption of risks, but in the state of the evidence the case could not be taken from the jury.

The defendant submitted seven requests to charge which were not in terms complied with. The first request was: "That the plaintiff must prove every affirmative allegation material to the issue that is set up in his declaration. He must prove that in mounting the car as he claims, that it was a duty devolved upon him by his employment for the defendant, and there being no proof in the case that any such duty was imposed upon him by the defendant, or was fairly required by the duties of his service at the time of the accident he cannot recover." The argument made by the defendant upon this request, which asked the court to instruct the jury that their verdict must be for the defendant, is that it is one of the material allegations of the declaration that it was the duty of the plaintiff to mount moving trains, and that there was no evidence whatever of any such duty. But the evidence of the plaintiff as to the movement of trains and the use of "grab-irons" and other appliances tended to show that trainmen were expected to mount moving trains. Several inquiries were put to the plaintiff in cross-examination with the apparent purpose of shaking his testimony tending to show that the mounting of moving cars was incidental to his employment, but these inquiries elicited nothing of a discrediting character. The practical necessity on the part of trainmen of mounting moving cars is recognized by the law which provides that railway companies shall equip their cars with end ladders rather than with side ladders. Kiley's testimony with respect to the incidental duty of mounting moving trains does not appear to have been contradicted.

The second request was this: "That there was no emergency present before the plaintiff at North Dorset that required him to mount a moving train in the night time, and that it is a principle of the law of negligence well settled by repeated decisions of the courts all over the country that a party cannot voluntarily and unnecessarily place himself in a position that he knows is dangerous, or that an ordinarily prudent man in his position, would know is dangerous, when there are other positions that he might take in the discharge of his duty that are safe, and if he does so he cannot recover any damages for the injuries he may receive." To say nothing of this request in other respects, it is enough to point out that it denies recovery of damages to one who has received injuries in a hazardous position which he has voluntarily and unnecessarily taken although the hazard to which he has exposed himself has in no way contributed to his injuries. *Corbin v. Railway Co.*, 78 Vt. 458. The defendant cites several cases, but what is said in the cases so cited is guarded in the very respect in which this request is not guarded.

The third request was as follows: "The plaintiff avers in his declaration that the defendant employed incompetent servants to inspect its cars. The burden of proof is upon the plaintiff to make out this fact, if the plaintiff relies upon such incompetency to support his case; that the competency of the servant is to be presumed until the contrary appears; that a single act of negligence is not enough to support the claim of incompetency, that the only act proved in this case that the plaintiff may claim is negligence on the part of Howley, the inspector, is his omission to test the rounds of this ladder by applying force to them; that the jury are not at liberty to set up their own standard as to the competency of Howley, nor as to the methods to be applied to make a proper test, but are limited and confined to the proof in the case in respect to that question, and there being no evidence in the case showing or tending to show his incompetency, except this single omission, the jury are charged that incompetency is not established." This request relates to the question of the competency of Howley. But the court disposed of the question of incompetency by charging in accordance with the defendant's contention, that there was no

evidence tending to show that Howley was an incompetent inspector and no claim that he was. In argument this request is treated as touching on the question of Howley's negligence and that element is, in a way, woven into the request. But upon that question it is enough to refer to what is herein said in considering the second ground of the defendant's motion to have a verdict directed.

The defendant fourthly requested the court to charge that "if Howley was incompetent or otherwise negligent, or negligent in the discharge of his duties he was a fellow servant of this plaintiff and for that reason this plaintiff cannot recover." There is no occasion for saying anything further about the question of competency; but under this request the question is for consideration whether or not the inspector, in the discharge of his duties as such, was a fellow servant of the plaintiff, so that the plaintiff is disentitled to recover because of the fellow servant doctrine.

If the case of *Hard v. R. Co.*, 32 Vt. 473, is law, the plaintiff and Howley were fellow servants. But that case was shown to have been erroneously decided in the fully and carefully considered case of *Davis v. R. Co.*, 55 Vt. 84. The Davis case practically overrules the Hard case. That negligence in respect to inspection generally is the master's negligence is the doctrine of *Houston v. Brush*, 66 Vt. 331. The opinion cites *Davis v. R. Co.*, as authority and makes no reference to *Hard v. R. Co.*, for the obvious reason that the case is not authority. See also *Mahoney's Adm'r. v. R. Co.*, 78 Vt. 244 and *Reynolds v. R. Co.*, 64 Vt. 66.

There are several cases in other jurisdictions which hold that a railroad company's inspectors, in the inspection of its own cars, act as fellow servants of trainmen. These cases are in line with the Hard case in this State just referred to. But it must be said that to-day the doctrine is very generally and firmly established that such inspectors so acting are in the performance of a duty which peculiarly rests upon the company, and which the company cannot so delegate as to relieve itself from responsibility for its non-performance. See *Texas etc. R. Co. v. Barrett*, 166 U. S. 617; *Union Pacific R. Co. v. Daniels*, 152 U. S. 684; *Baltimore etc. R. Co. v. Baugh*, 149 U. S. 369; *Washington etc. R. Co. v. McDade*, 135 U. S. 554; *Northern*

Pacific R. Co. v. Herbert, 116 U. S. 642; *Northern Pacific R. Co. v. Babcock*, 104 U. S. 190; *Hough v. R. Co.*, 100 U. S. 213; and see the cases cited in the above list. In this State the principle applicable is now so well settled as to make discussion of it superfluous.

In the case at bar it is more particularly urged by the defendant that, in the inspection of foreign cars, the inspectors of a railroad company are fellow servants of the trainmen of the train into which the cars go; that the duty of the master is discharged when he makes provision for inspection by competent inspectors. Upon this question it was more difficult fifteen or twenty years ago to say on which side the weight of authority rested than it is now to say on which side it rests. The great preponderance of recent authorities goes to establish the doctrine, which this Court now declares and applies, that an inspection of foreign cars as they come to a company from other roads is the receiving company's duty, growing out of its obligation to exercise circumspection for the safety of its employees, and that such being the character of the duty, whoever is commissioned to discharge it acts as the representatives of the company and not as the fellow servant of trainmen, and that however competent the inspector may be his negligence, if he is negligent, is the negligence of the company for which it is responsible under the general law of negligence without protection from the fellow servant doctrine.

Gottlieb v. R. Co., 100 N. Y. 462, 3 N. E. 344; *Goodrich v. R. Co.*, 116 N. Y. 398, 22 N. E. 397, 15 Am. St. Rep. 410; *Eaton v. R. Co.*, 163 N. Y. 391, 57 N. E. 609; *Jones v. R. Co.*, 20 R. I. 210, 37 Atl. 1033; *Gutridge v. R. Co.*, 94 Mo. 468, 4 Am. St. Rep. 392; *Louisville etc. R. Co. v. Williams*, 95 Ky. 199, 44 Am. St. Rep. 214; *Louisville etc. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Missouri etc. R. Co. v. Chambers*, 17 Tex. Civ. App. 487, 43 S. W. 161; *International etc. R. Co. v. Kernan*, 78 Tex. 294, 22 Am. St. Rep. 52; *Jones, Receiver, v. Shaw*, 16 Tex. Civ. App. 290, 41 S. W. 690; *Union etc. Co. v. Goodwin*, 57 Neb. 138, 77 N. W. 357; *Missouri etc. R. Co. v. Barber*, 44 Kan. 612; *Atchison etc. R. Co. v. Penfold*, 57 Kan. 148; *Budge v. Morgan's etc. Co.*, 108 La. 349, 32 So. 535; *Moon v. R. Co.*, 46 Minn. 106, 24 Am. St. Rep. 195; *Dooner v. Canal Co.*, 164 Pa. St. 17, 30 Atl. 269; *Mason v. R. Co.*, 11 N. C. 482, 32 Am. St. Rep. 814; *Louisville etc. R. Co.*

v. *Reagan*, 96 Tenn. 128; *Texas etc. R. Co. v. Archibald*, 170 U. S. 665; *Baltimore etc. R. Co. v. Mackey*, 157 U. S. 72.

The above cases are referred to as fully sustaining the proposition that in the inspection of the foreign car in question the inspector, Howley, was not the fellow servant of the plaintiff Kiley. The request which we are now considering raises no question as to the degree of thoroughness of the inspection which the company was in duty bound to make, and the cases last cited are not referred to for their bearing upon that question.

There are a few cases which sustain the defendant's contention but for the most part they are from courts whose later decisions are given above. The case of *Mackin v. R. Co.*, 135 Mass. 201, sustains the defendant's contention and has never been overruled, though in consequence of a legislative enactment the Massachusetts court is now able to apply and does apply the law as it is generally understood. See *Bowers v. R. Co.*, 162 Mass. 312, 38 N. E. 508. The case of *Smith v. Potter, Receiver*, 46 Mich. 258, makes an inspector a fellow servant of a trainman in respect to the inspection of foreign cars, but does this on the untenable ground that an inspector is a fellow servant of trainmen in the inspection of cars whether they are foreign or not. The ground on which this case was decided is no longer maintained by the Court which rendered the decision therein. *McDonald v. R. Co.*, 132 Mich. 372, 93 N. W. 1041. *Anderson v. R. Co.*, 68 N. J. Law 647, 54 Atl. 830, though not on the defendant's brief, was somewhat relied on in oral argument. But that case disapproves of the Massachusetts doctrine as announced in *Mackin v. R. Co.*, 135 Mass. 201, and holds that a company receiving a foreign car for transportation is bound to make such examination as would be likely to discover conditions which would render the car unsafe for use assuming its original construction to have been proper.

The few cases which relieve a railroad company from a master's duty in respect to the inspection of foreign cars do so, in so far as any reason is given, upon the ground that the company as a common carrier and by statute law must receive and forward such cars. Our statute provides that a railroad company shall receive and transport such cars at reasonable times and on reasonable terms, and the statutes of other states are very similar. Such statutes are intended to prevent unjust

discriminations and ill grounded obstructions, but the argument is far fetched that the duty to transport cars "at reasonable times and on reasonable terms" obliges a company to transport a car which is in an unsafe condition, or relieves the transporting company from a master's duty of inspection, or makes the inspector in the performance of that duty a fellow servant of the trainmen of the train into which the foreign cars go. Every company that transports a foreign car loaded with freight uses the car in its own business of carrying freight for hire. See *Reynolds v. R. Co.*, 64 Vt. 66.

The defendant's fifth request was: "That the sufficiency of the ladder is to be presumed unless there be evidence in the case that with fair usage it was insufficient." In respect to the matter of the request there was no presumption of law, but rather an absence of such presumption. Negligence on the part of the defendant was not to be presumed. Insufficiency of the ladder was not to be presumed. The burden of proof in respect to such negligence and such insufficiency was on the plaintiff, and there the charge of the court correctly placed it.

The defendant's sixth request was as follows: "That the plaintiff was not justified in choosing one of two dangerous positions to mount a moving train, if a safe position was available to him, and had no right to start his train and thereby create a dangerous condition, and then, with such condition present, attempt to board the moving train. If he did this, he assumed the risk of his attempt and the defendant is not liable for his injuries." In their brief, counsel for the defendant very properly consider this request in connection with the second request, and the court could not comply with it for the same reason that it could not comply with the second request. This request like the second if complied with would have precluded the plaintiff from recovering for his injuries even if the jury found, as under the testimony they might, that the risk of the attempt, whatever it may have been, did not contribute to the injury. What is herein said in considering the second request need not be repeated.

The defendant's seventh request, not complied with to the satisfaction of the defendant, was the following: "The mere fact that a fellow servant is incompetent, or that the materials have proved defective, or that the appliances or machinery

used in the prosecution of the business have proved insufficient, does not tend even *prima facie* to establish any negligence on his part, but the burden in all such cases is upon the servant seeking recovery to establish the fact that the master did not use reasonable care in these respects or either of them." The defendant's brief does not argue this request but simply says: "The seventh request should have been complied with." However, the charge upon the burden of proof and upon the matters connected therewith was a substantial compliance with this request. Reference is made to *Morrisette v. R. Co.*, 76 Vt. on page 267, for what was deemed a substantial compliance with a request applicable there and here, though not always, that "there is no presumption of negligence from the mere happening of the accident."

The defendant also excepted to the charge of the court upon the subject-matter of the above seven requests. This exception was altogether too vague and general to avail anything. As has been seen these seven requests covered in a more or less involved form a large part of the law applicable to the case. If in the course of the charge, the court stated any proposition which the defendant's counsel deemed unsound a specific exception was needed to bring the proposition before this Court for review. *White v. Lumiere etc. Co.*, 79 Vt. 206; *Luce v. Hassam*, 76 Vt. 450; *State v. Sargood*, 77 Vt. 80.

The trial court should always know what is excepted to. This Court should always be able to see that a question argued here was distinctly raised below.

Judgment affirmed.

GEORGE B. POST AND W. ALLSTON FLAGG v. THE RUTLAND
RAILROAD CO.

Special Term at Rutland, November, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed February 6, 1908.

*Railroads—Construction—Taking of Land for Right of Way—
Condemnation Proceedings—Preliminary Survey and Loca-
tion—Conclusiveness on Corporation and Landowners—
Statutes—Constitutionality—Master's Report—Insufficient
Findings.*

The preliminary survey and location of the right of way of a proposed railroad, which P. S. 4393 requires to be made and recorded in the town clerk's office, constitutes the taking of the land; and the jurisdiction of the commissioners, subsequently appointed under P. S. 4398 to appraise the land owners' damages, is confined to the land so located and described.

The location determined upon must be ascertained from the survey of record, which cannot be varied or modified by extrinsic evidence, and is conclusive on both the corporation and the land owner.

In a suit in equity to restrain a railroad corporation from constructing its railroad across the orator's land, where defendant claims the right to do so under the power of eminent domain, it must show that the condemnation proceedings on which it relies were had strictly in accordance with the provisions of law.

In such case where, as to the certificate of location filed in the town clerk's office in accordance with the requirements of P. S. 4393, the master reports only that it erroneously described the land in question as being the land of a person other than the orators, and recited the survey thereof as beginning thirty-six feet southeasterly from the southwesterly corner of the land of a named person, when in fact it began that distance from the southeasterly corner of that land, but that "such error would not deceive or mislead a person examining the premises, as to the actual or

intended location thereof," the constitutionality of the statute under which the condemnation proceedings were had will not be decided until such additional facts are reported as will enable the court legitimately to determine whether the land in controversy is within the limits of the recorded location.

APPEAL IN CHANCERY. Heard at the September Term, 1906, Rutland County, *Miles*, Chancellor, on the pleadings and master's report. Decree, *pro forma*, dismissing the bill with costs to the defendant. The orators appealed.

The bill prays that the defendant be perpetually enjoined from constructing its railroad across the orators' land, alleging that defendant proposes to take the land necessary for that purpose under the eminent domain proceedings prescribed by V. S. 3814 to 3821, which proceedings the bill alleges are void for that no proper preliminary survey and location of its proposed road was ever filed by defendant in the town clerk's office, nor delivered to the orators.

The master reported that one George E. Royce owned a marble quarry situated about one hundred twenty rods from the main line of defendant's railroad; that he desired to have a spur track built at his expense and for his own use, from the main line of defendant's railroad across the orators' land, and the land of other persons, to said quarry, and contracted with defendant for its construction; that he acquired by purchase all the requisite right of way, except that over the orators' land, for the acquirement of which defendant instituted condemnation proceedings in August, 1902; that such proceedings were thereupon had as resulted in the appointment of three commissioners by two judges of the Supreme Court to appraise the orators' damages for the required land, who, after due hearing, awarded the orators one hundred and fifty dollars as their damages for the taking of the land in question, which they declined to accept; that at the hearing before said commissioners the orators filed objections to the commissioners' jurisdiction for that "no valid legal authority exists to take land by the right of eminent domain for the purpose aforesaid," and for that "no plan or description in writing was delivered to the owners or deposited in the clerk's office in the town in which the same was situated at least ten days before the appraisal, as required

by law''; that the commissioners overruled those objections and proceeded with the hearing; that since the commencement of this suit said spur track has been built from defendant's main line, across the orators' land, to said quarry, at the expense of said Royce, who built it for his own use in connection with his said quarry, and that no facilities for its use by the public at either terminal, or elsewhere, have been provided. The opinion quotes all that the master reports as to the contents of the certificate of location filed by defendant in the town clerk's office.

Edward S. Marsh for the orators.

''Condemnation proceedings are purely statutory, and in derogation of common right, and the statutory authority must be strictly pursued, and every condition or other pre-requisite to the exercise of the jurisdiction observed.'' ''Every requisite of the statute having the semblance of benefit to the land owner must be strictly complied with, and so must the portion of it in which the public have a general interest. Extreme accuracy and the utmost strictness are essential.'' 7 Enc. Pl. & Pr. 468-9; 10 Am. & Eng. Enc. 2nd ed. 1054; *Loucheim v. Hemsley*, 59 N. J. L. 149; *Schneider v. Rochester*, 160 N. Y. 165; *Matter of House Ave.*, 67 Barb. (N. Y.) 350; *Matter of Flatbush Ave.*, 1 Barb. 286; *Mobley v. Breed*, 48 Ga. 44; *Detroit etc. R. Co. v. Wayne Circuit Judge*, 95 Mich. 318; *Coster v. New Jersey R. etc. Co.*, 23 N. J. L. 227; *Connecting R. Co. v. United New Jersey R. etc. Co.*, 53 N. J. L. 217; *Champlain v. McCrea*, 165 N. Y. 264; 7 Enc. Pl. & Pr. 520-1; *Leavenworth Terminal R. etc. Co. v. Atchison*, 137 Mo. 218.

The taking of land by the right of eminent domain for the purpose of building a spur track to a quarry owned by a private individual is the taking of said property for private uses, and is in contravention of Article 2 of the State Constitution, which forbids by implication the taking of private property for private use. *Snow v. Sandgate*, 66 Vt. 451; *Tyler v. Beacher*, 44 Vt. 648; *N. E. Trout & Salmon Club v. Mather*, 68 Vt. 338; *Avery v. Vt. Elec. Co.*, 75 Vt. 235; *Pittsburg etc. R. Co. v. Benwood Iron Works*, 31 W. Va. 710; *Chicago etc. R. Co. v. Wiltse*, 116 Ill. 449; *In re Rochester etc. Co.*, 59 Hun. 617; *In re Split Rock Cable Road Co.*, 58 Hun. 351; *State v. Hazelton etc. R. Co.*,

40 Ohio St. 504; *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. 615; *Stearns et al. v. City of Barre*, 73 Vt. 281.

The acts in question are also in violation of the equality clause of the Fourteenth Amendment of the Federal Constitution. *State v. Hayes*, 81 Mo. 574; *Louisville etc. R. Co. v. R. R. Comrs.*, 19 Fed. 679; *New York v. Roberts*, 171 U. S. 658; *Pittsburg R. R. Co. v. Benwood Iron Works*, 21 W. Va. 710.

H. Henry Powers for the defendant.

Whoever of the general public desires to purchase marble from Mr. Royce and transport it to its destination, can compel the defendant, operating the spur in question, to transport such freight at a reasonable rate. This is the test that determines the public use of this spur. *Whiting v. Sheboygan R. R. Co.*, 25 Wis. 167; *State v. Hibernia R. R. Co.*, 47 N. J. Law 43; *Contra Costa R. R. v. Mears*, 23 Cal. 323; *Chicago & N. W. R. R. Co. v. Meaham*, 56 L. R. A. 240; *Ulmer v. Lime Rock R. R. Co.*, 98 Me. 579; 3 Elliott, Railroads, §§960, 961.

WATSON, J. The statute, giving railroad corporations the power to take real estate for a right of way by eminent domain, provides that before such a corporation commences proceedings for that purpose "it shall cause the location of its road signed by a majority of the directors, defining the courses, distances and boundaries of the same in each town through which it passes, to be recorded in the respective town clerks' offices in said towns; * * *." V. S. 3809. When the corporation has not acquired such real estate by gift or purchase, and if the parties do not agree as to the price thereof, two judges of the Supreme Court, on application by the corporation, shall appoint commissioners to determine the damages which the owners of such lands have sustained by the occupation of the same for the purpose named. V. S. 3814. And at least ten days before the appraisal, the corporation shall deliver to the owner, or deposit in the clerk's office in the town in which the same is situated, a plan or description in writing of the land so taken. V. S. 3816. These provisions and some others apply to the defendant in locating and constructing branches of its road to connect with marble quarries in the town of Brandon. Laws of 1868, No. 141.

The master finds that the condemnation proceedings taking the orators' land in question were in accordance with the requirements and provisions of the statute, unless the legal effect thereof is changed or modified by the facts that, "The premises in question were described in the certificate of location filed in the town clerk's office and signed by the president and a majority of the directors as being the land of E. S. Marsh instead of land of the orators, and in the description thereof the place of beginning the survey was described as being thirty-six feet southeasterly from the southwesterly corner of F. R. Button's land and in the division line between lands of the Rutland Railroad Company and E. S. Marsh, when such point or place of beginning was thirty-six feet southeasterly from the southeasterly corner of said Button's land, but such error would not deceive or mislead a person examining the premises, as to the actual or intended location thereof." The sufficiency of the description in the recorded location is challenged.

The survey and location of the road constituted the taking of the land over which it was laid,—*Troy & Boston R. R. Co. v. Potter*, 42 Vt. 265,—and in appraising the damages to which the owners of the land so taken were entitled, the commissioners were confined to the land within the limits of the road thus located and laid out. Beyond that they had no jurisdiction. It devolves upon the defendant to show that the condemnation under which it claims to hold the land of its right of way in question was strictly in accordance with the provisions of law. In addition to misdescription as to ownership, the report of the master shows only the point of beginning in the survey of the location, and that that is radically inaccurate when applied to the description of the land on which the road was built. True the master finds that this "error would not deceive or mislead a person examining the premises, as to the actual or intended location." But this finding cannot aid the defendant. The location of the road when recorded was the only written permanent record evidence of the land taken, and it is conclusive upon the corporation and the land owner. The location determined upon must be ascertained from the survey of record with such reference to any plan or map filed therewith and constituting a part of the description, as may be proper. The written location may be explained, but it cannot be varied or modified.

Nor is extrinsic evidence admissible to show that the land in controversy was intended to be taken, or was in fact taken.

Other questions are raised upon the record, including the constitutionality of the statute under which the condemnation proceedings were had, but they will not be decided until the facts reported are such as to enable the Court legitimately to determine whether the land in controversy is within the limits of the recorded location. If it is not, the question of the validity of the statute is not involved.

Decree reversed pro forma and cause remanded with directions that further proceedings be had before the master in accordance with the views here expressed.

THE H. C. JAQUITH CO. v. J. Q. SHUMWAY'S ESTATE.

January Term, 1908.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed February 14, 1908.

Corporations—Servants and Agents—Formal Authorization—When Unnecessary—Directors—Parol Evidence of Their Acts and Decisions—Trove—Ownership—Evidence—Admissibility—Opinions—Bill of Sale—Book Entries—Tax Inventory of a Party—Failure to File—Declarations—Tax Inventory of Third Person.

In trover for seizing and selling plaintiff's mare on a tax warrant against another, on the issue whether the mare was owned by plaintiff or the delinquent tax payer the burden is on plaintiff. Corporations are bound by the acts of their servants and agents within the ordinary line of their duty, without a formal vote conferring such authority.

In trover by a corporation for seizing and selling plaintiff's mare on a tax warrant against its manager personally, where the issue was as to the ownership of the mare, plaintiff claiming that, by its said manager, it purchased the mare and six other horses in Boston in 1902, plaintiff was properly allowed to show by its treasurer that before said purchase its directors decided to buy more horses for its use, and sent its manager away to buy them; as that was an act in the ordinary course of business, which was neither claimed nor likely to have been a matter of record.

Plaintiff's treasurer testified that plaintiff bought seven horses in Boston in 1902, one of which was the mare in question, and produced the bill of sale which he testified had been kept in plaintiff's office, and produced a ledger, journal and cashbook and identified them as plaintiff's books kept by him as treasurer, all without objection. *Held*, that it was not error then to allow him to testify that a certain entry in the ledger referred to "the seven horses bought in Boston on that bill of sale," naming the seller, and that another entry represented the purchase price of the horses and the expense of going to Boston for them, although the witness had no personal knowledge of when, where, or of whom the horses were purchased, or of their price, or who made the bill of sale; as in the questioned testimony the witness stated nothing about the purchase of the horses besides what he had previously stated without objection, and it amounted merely to pointing out and identifying the entries as memoranda of the purchase of certain horses received by plaintiff.

Such book entries were admissible only as memoranda to be weighed in connection with the witness's testimony, and it would have been error to have admitted them as independent evidence.

It was error to receive in evidence said bill of sale, which purports to be dated at Boston, November, 1902, and to be given to plaintiff for seven horses, among them, "one blk. mare," which plaintiff claimed was the mare in question, no evidence being offered to show the handwriting or signature nor when or by whom made, nor the identity of any of the horses with the mare in question.

It was error to allow plaintiff's witness to state who owned the mare in question at the time of its alleged conversion, as that must have been either hearsay, or his opinion on the precise question that the jury were to decide.

As bearing on the value of the mare in question, her present owner was properly allowed to testify that when he sold his stage route he reserved the mare because she was a good worker.

Although it appeared that in the winter of 1904, plaintiff's manager, who had not testified, took the mare in question with him to Plymouth, Vermont, where he continued to live and possess and use her till the following August, when she was seized and sold on the tax warrant against him, defendant's evidence, offered as tending to show that the manager owned the mare, that he included her in his tax inventory filed that year with the lists of Plymouth, was properly excluded, as a declaration not authorized by plaintiff; and whether the manager had changed his residence to Plymouth was immaterial.

It appearing that the mare in question was in Plymouth, Vermont, from the winter of 1904, till the next August, when she was seized and sold on the tax warrant, it was error to exclude defendant's evidence, offered as tending to show that plaintiff did not own the mare, that plaintiff filed no tax inventory in Plymouth in the year 1904.

Plaintiff was not entitled to have the jury instructed that they might infer plaintiff's ownership of the mare in question from plaintiff's possession and use of her; but the court correctly instructed that such possession and use were to be considered by the jury with the other circumstances and testimony in the case.

APPEAL from the disallowance by the commissioners on the estate of J. Q. Shumway of a claim presented by The H. C. Jaquith Co. Declaration, trover for a mare seized and sold on a tax warrant against another. Plea, the general issue. Trial by jury at the April Term, 1907, Windham County, *Taylor, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The only issue was as to the ownership of the mare and her value. The mare was taken from the possession of R. B. Jaquith at Plymouth on August 19, 1904, by J. Q. Shumway, as collector of taxes for the town of Jamaica, on a tax warrant against said Jaquith, and by said collector sold at public auction at said Plymouth on August 23, 1904, to satisfy said tax.

Defendant excepted to the claimed failure of the court to comply with his sixth request for instructions, which was as

follows: "If at the time, and for several months next preceding the taking of the mare by Shumway, R. B. Jaquith had possession, use and control of her and such possession, use and control was so open and apparent that he appeared to be the owner of her, the jury may infer, that though she may have once been the property of the plaintiff, there was some sale or arrangement by which she became the property of R. B. Jaquith."

Gibson & Waterman, J. K. Batchelder, and A. V. D. Piper for the defendant.

The issue was whether the mare was purchased by plaintiff or by Jaquith personally. Plaintiff was allowed to introduce its own books to show the purchase by itself. The entries were merely plaintiff's own statements of a past transaction, and their admission was error. *Godding v. Orcutt*, 44 Vt. 54; *Cross v. Bartholomew*, 42 Vt. 206; *Lapham v. Kelly*, 35 Vt. 195; *Worden v. Powers*, 37 Vt. 619; *Goetz v. Bank of Kansas City*, 119 U. S. 551; *Osborn v. Robbins*, 37 Barb. 482; *Small v. Gilman*, 48 Me. 506; *Wilson v. Sherlock*, 36 Me. 295.

The tax inventory of R. B. Jaquith claiming the mare as his property was admissible, it being a declaration of one of plaintiff's principal officers as to the ownership of the mare. 10 Cyc. 947, 948; *Bank v. Rogers*, 18 N. H. 255; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380.

William W. Stickney, John G. Sargent, and Homer L. Skeels for the plaintiff.

The ordinary acts of management by the directors of a corporation are not usually the subject of record and must necessarily be shown by parol. *Bank v. Dandridge*, 12 Wheat. 64, 82; *Foot v. Railroad Co.*, 32 Vt. 633; *Waite v. Mining Co.*, 37 Vt. 608.

TYLER, J. The plaintiff seeks to recover in this action of trover the value of a certain black mare which the intestate in his lifetime, as a tax collector, seized and sold as the property of R. B. Jaquith upon a tax warrant against him.

The issue in the trial court was whether the mare was owned by the company or by Jaquith. The burden of proof was upon the plaintiff.

The plaintiff, a corporation, had its place of business and legal residence in Weston, and Jaquith was its president and general manager.

The plaintiff claimed, and its evidence tended to show, that Jaquith, as general manager, on Nov. 1, 1902, bought the mare and six other horses, for the company, of Edgar Snow in Boston, Mass., and paid for them with his own check; that the horses arrived at Ludlow on the same day and were taken by Jaquith and his sons to Weston and placed in his barn there.

No one testified to having witnessed the purchase of the horses, and the record states that the first that was seen of them was when they were being taken from the cars at Ludlow. It seems to have been immaterial, if it were a fact, that they were bought in Boston except as it bore upon the question of the purchase of the black mare by Jaquith. The defendant claimed that Jaquith bought her for himself, or that he bought her subsequently, and owned her when she was taken by Shumway.

1. It was competent for the plaintiff to show by the testimony of its treasurer that the directors decided to buy more horses for the company's use, and sent Jaquith away to buy them. This was an ordinary transaction in the course of business, not likely to be, and it is not claimed that it was, a matter of record. Corporations are bound by the acts of their servants and agents within the ordinary line of their duty without a formal vote conferring such authority. *Foot & Hodges v. R. & W. R. Co.*, 32 Vt. 633. Judge Aldis remarked in his opinion that this proposition was too plain to need the citation of authorities.

2. H. C. Jaquith, the plaintiff's treasurer, a son of R. B. Jaquith, called as a witness for the plaintiff, testified that the company bought seven horses in Boston in 1902, and that he had a bill of sale of them. He produced it and testified that it had been kept in the company's office in Weston and that the mare in question was one of the seven horses. The record does not show that any objection was made by the defendant to the admission of this evidence. The witness then produced the company's ledger, journal and cashbook which he identified as the plaintiff's books kept by him as treasurer. He was then shown

an entry on the ledger, under the head of "Teams," and being asked what it referred to, answered: "It refers to seven horses," and being asked what seven horses, he answered: "The seven horses bought in Boston on that bill of sale," and being asked what paper he meant, answered: "Bought of Edgar Snow."

The witness' attention was then called to a similar entry upon the journal and testified in the same way about that entry. He testified that another entry represented the purchase price of the horses and the expense of going to Boston for them. To all these questions and answers the defendant seasonably excepted. The exception cannot be sustained for the reason that the witness stated nothing further in his answers about the purchase of the horses in Boston than he had previously stated without objection. The case states that the witness had no personal knowledge of when, where or of whom the horses were purchased or how much was paid for them, or who made the bill of sale, "except as herein stated." The fair construction of his answers is that he merely pointed out these entries upon the books as memoranda of the purchase of the horses that arrived in Weston November 1, and identified the book entries as such memoranda. It is not reasonable to suppose that the jury understood him as testifying from his own knowledge where the horses were bought.

3. The book entries and the bill of sale were afterwards admitted in evidence under the defendant's exception. The book entries were legitimate evidence only as memoranda which were to be weighed by the jury in connection with and as corroborative of the witness' testimony. *Stillwell v. Farwell*, 64 Vt. 286, is directly in point. See, also, *Cross v. Bartholomew*, 42 Vt. 206. If the entries were admitted as independent evidence of the purchase, their admission was error. As it is not clear for which purpose they were admitted, we pass this question without deciding it.

4. The bill of sale is dated Boston, Mass., Nov. 1, 1902, and purports to have been given by Edgar Snow to M. H. C. Jaquith Company for seven horses, giving their prices, among them "one blk. mare," which the plaintiff claimed was the mare in question. The handwriting of the bill of sale and signature were not proved, nor was it shown where, or when or by whom it

was made except what appears upon its face, and no evidence was offered to show the identity of any horse mentioned in it with the mare in controversy. It only appeared that Jaquith showed the paper to a person at Ludlow when the horses were being taken from the cars and that it has since been with the company's papers in Weston. The admission of the paper was error.

5. The witness H. C. Jaquith was asked by plaintiff's counsel: "Whose horse was this at the time Mr. Shumway took it?" and he answered, "The H. C. Jaquith Company's horse." The witness had no knowledge upon the subject, his answer must have been based upon what others had told him, was the expression of his opinion upon the precise question that the jury were to decide, and was likely to mislead them. It was error to admit it.

6. It was competent for the plaintiff to show by Sumner, the present owner of the mare, that when he sold his stage route where she had worked, he kept her because she was a good worker. It was a circumstance bearing upon the value of the mare which was in question.

7. It appeared that after the mare was purchased she remained in Weston until the winter of 1904, during which time she was used in the plaintiff's teams drawing lumber, was driven by the plaintiff's officers and employees and frequently by R. B. Jaquith and his family. It also appeared that in the winter of 1904 R. B. Jaquith moved with his wife to Plymouth and continued to live there until after the mare was taken by Shumway the following August; that Jaquith took the mare with him to Plymouth and kept her in the barn of the O'Brien Lumber Co., of which he was the general and active manager; that he required and used her almost daily in that business and for driving purposes. The defendant claimed that Jaquith changed his residence to Plymouth, and for this purpose offered to show that in the year 1904 he filed with the listers an inventory giving in his poll to that town and that he put in as his property, belonging in that town, eleven horses, one of which the defendant offered to show was the mare in controversy. The offer was excluded as a declaration by Jaquith, not authorized by the company nor made in the course of his duty as an officer thereof. The evidence was properly excluded for the reasons stated by

the court, that Jaquith was not a party to the suit and had not testified, so that the offered evidence could be used to impeach him. Whether or not he had changed his residence to Plymouth was immaterial.

8. The defendant offered to show that the plaintiff filed no inventory in Plymouth in the year 1904. It had appeared that the mare was in Plymouth from the winter of 1904 until the next August. If she was owned by the plaintiff it was its duty to place her in an inventory and deliver the inventory to the listers of Plymouth. V. S. 405 makes it the duty of owners of taxable personal property to deliver an inventory thereof to the listers of the town where it is situated on the first day of April. If the plaintiff omitted this statutory duty it was a fact which the defendant was entitled to have the jury consider as bearing upon the question of ownership. It was error to exclude the evidence.

9. The plaintiff was not entitled to a charge that the jury might infer ownership in the plaintiff from its possession and use of the mare as shown by the evidence. The court correctly charged that such possession and use were to be considered by the jury with the other circumstances and the testimony in the case.

Judgment reversed and cause remanded.



INDEX.

ABATEMENT.

See "EQUITY" § 2.

ABORTION.

See "EVIDENCE" §§ 5, 9.

In a prosecution for attempting to procure a miscarriage, causing death, evidence examined, and *held* sufficient to warrant a finding that the prisoner wrote certain letters to deceased, the contents of which were shown by secondary evidence. *State v. Ryder*, 422.

ACTION.

Under V. S. 1680, *held* that all causes of action on different contracts between the same parties that can be joined in one action, should be joined. *Massucco v. Tomassi*, 186.

APPEAL AND ERROR.

See "EVIDENCE" § 4.

§ 1. Nature and Form of Remedy.

Writs of error are not appropriate for the purpose of taking contempt proceedings to the Supreme Court, notwithstanding V. S. 1625. *In re Consolidated Rendering Co.*, 55.

§ 2. Decisions Reviewable.

Where, in a suit tried before a master, a document on which he ruled is not in the record, the exception to his report for such ruling will not be considered. *Royce v. Carpenter*, 37.

The question whether a master erred in receiving or rejecting evidence *held* not presented for review. *Ibid*.

On appeal, exceptions to a master's report that are not founded on objections made before the master will not be considered. *Ibid*.

In order to raise the question whether a master erred in receiving or rejecting evidence, his report must furnish the foundation for the question. *Ibid.*

Whether a witness is qualified to testify as an expert is a preliminary question for the trial court, and its decision thereon is not revisable where there is evidence tending to support it. *Place v. Grand Trunk Ry. Co.*, 196.

The ruling of the trial court on the question of the remoteness of offered evidence is not, ordinarily, revisable. *Smith v. C. V. Ry.*, 208.

A motion to set aside a verdict as against the weight of the evidence is addressed to the discretion of the trial court, and unless such discretion is abused, its exercise is not reviewable. *Ward's Admr. v. Ins. Co.*, 321.

The sufficiency of specifications tendered by the State in a prosecution for selling intoxicating liquor is within the discretion of the trial court, the exercise of which is not reviewable. *State v. Webster*, 391.

A fictitious or suppositional question as to the admissibility of evidence will not be considered. *Ibid.*

§ 3. Record and Proceedings Not in Record.

The proceedings of special masters are presumed to be correct, and the burden is on the excepting party to see that any claimed error affirmatively appears. *Hobart's Admr. v. Vail*, 152.

On exceptions, an objection that there was no evidence to sustain an instruction cannot be considered, where the transcript contains only part of the evidence. *Massucco v. Tomassi*, 186.

A ground of objection to the admission of testimony not made in the trial court cannot be considered on exceptions. *Ibid.*

A question not presented to the trial court on a motion in arrest cannot be considered in reviewing the court's ruling on the motion. *Ibid.*

A judgment is never arrested except for matters apparent on the face of the strict record; hence a motion in arrest of judgment, based on matters revealed by the evidence only, was properly overruled. *Morgan v. Hendrick*, 284.

Exceptions held too general to require consideration. *Ward's Admr. v. Ins. Co.*, 321; *Drouin v. Wilson*, 335; *Kiley v. Rutland R. Co.*, 536.

A general exception to a specified portion of the charge is too general unless that portion is wholly unsound. *State v. Ryder*, 422.

The trial court should always know what is excepted to, and this Court should always be able to see that a question argued here was distinctly raised below. *Kiley v. Rutland R. Co.*, 536.

§ 4. Review.

Where defendant occupied a confidential relation toward testatrix, in order to sustain the validity of an assignment to him, the master must affirmatively find, against the presumption to the contrary, that there was no undue influence. *Hobart's Admr. v. Vail*, 152.

In a breach of promise suit, admission of evidence *held* harmless error. *Massucco v. Tomassi*, 186.

In a breach of promise suit, any error in admitting testimony that defendant had promised a priest to marry plaintiff *held* harmless. *Ibid.*

In a will contest, where contestants failed to except to an erroneous instruction, but requested an instruction correctly stating the principle, which was refused, the error was available. *In re Rogers' Will*, 259.

In an action against a physician for malpractice, testimony of plaintiff as to his efforts to obtain relief from other physicians *held* not prejudicial. *Sheldon v. Wright*, 298.

In an action against a physician for malpractice, evidence of plaintiff's brother that he furnished plaintiff money to go to see another physician *held* not prejudicial as being an appeal to the jury's sympathy. *Ibid.*

On the trial of an action for malpractice, action of the court in allowing plaintiff's leg to be shown to the jury in a room adjoining the courtroom *held* not prejudicial. *Ibid.*

In an action on an accident policy, the exclusion of certain testimony *held* not prejudicial. *Ward's Admr. v. Ins. Co.*, 321.

In an action on an accident policy, an exception to, an instruction subsequently modified *held* not available. *Ibid.*

Where a bill of exceptions states that the plea is full performance, but an inspection of the plea itself shows it to be *non fregit conventionem*, this will be taken to have been pleaded and not that. *Drouin v. Wilson*, 335.

The presumption *held* to be, in case against a railroad, that plaintiff was a tenant by sufferance to whom the railroad owed no duty to construct crossings. *Marsh v. Rutland R. R. Co.*, 397.

Where no particular exception to a master's report is relied on in either brief for argument, but the exceptions are urged as a whole, the Court will not hunt for errors. *Davenport v. Davenport*, 400.

ARGUMENT OF COUNSEL.

See "TRIAL" § 2.

ASSIGNMENTS.

See "APPEAL AND ERROR" § 4; "GIFTS"; "PRINCIPAL AND AGENT" § 2;

"VENDOR AND PURCHASER."

A bond for a deed of real estate is a contract for the sale of real estate, and is assignable. *Royce v. Carpenter*, 37.

A court of equity will regard the substance rather than the mere form of an assignment, and will give it such effect as the parties intended. *Ibid.*

An assignment under seal and for valuable consideration is sufficient to convey property, regardless of the delivery of the subject-matter. *Hobart's Admr. v. Vail*, 152.

ASSUMPSIT, ACTION OF.

See "COMMON COUNTS."

ATTORNEY AND CLIENT.

Where defendant occupied a confidential relation toward testatrix, the lawyers who acted as advisers for her in a transaction with defendant could also act for defendant in drawing the necessary papers and in giving him necessary advice. *Hobart's Admr. v. Vail*, 152.

An attorney *held* not to lose his right to fees for making a collection by paying it all over to the client. *Davis v. Farwell*, 166.

An attorney by receiving and retaining a receipt on paying over a collection to his client *held* not to lose his right to fees for the collection. *Ibid.*

Evidence *held* not to show that an attorney retained in bad faith money collected, as bearing on his right to compensation. *Ibid.*

Evidence offered by a defendant in an action for attorney fees, as to former suits on the same matter, to show harassment, *held* immaterial. *Ibid.*

The relation of attorney and client is one of trust and confidence, and requires the utmost good faith on the part of the attorney. *Ibid.*

BANKRUPTCY.

§ 1. Constitutional and Statutory Provisions.

The exception of the Federal Bankruptcy Act from the operation of a discharge, of judgments in actions "for wilful and malicious injuries to the person or property of another," extends to all actions in which the facts of intent and malice are judicially ascertained by direction of law, however the act may be characterized by the pleadings. *Flanders v. Mullin*, 124.

A close jail certificate *held* sufficient to show that a judgment was founded on a wilful and malicious injury to the person, within the meaning of the Federal Bankruptcy Act, excepting from the operation of a discharge judgments in actions "for wilful and malicious injuries to the person of another." *Ibid*.

The malice contemplated by that provision of the Federal Bankruptcy Act excepting from the operation of a discharge judgments in actions "for wilful and malicious injuries to the person or property of another" is not malice in the broadest sense, but involves some act or neglect due to a wrongful motive. *Ibid*.

Under the Federal Bankruptcy Act, liens created by attachments more than four months prior to the filing of the petition *held* not invalidated by the adjudication. *Batchelder & Co. v. Wedge*, 353.

BASTARDY.

See "NEW TRIAL."

In a bastardy proceeding, an exception *held* insufficient to enable defendant to question the town's right to payment for the support of the child. *Reynolds v. Hassam*, 501.

BILLS AND NOTES.

See "EVIDENCE" §§ 4, 9; "EXECUTORS AND ADMINISTRATORS."

The finding that testatrix, having received certain notes against her husband indorsed to her by her father, bequeathed to her husband for life all the income of her property, including the interest on the notes, involves the further finding that those notes were a part of her property. *Church's Est. v. Church's Est.*, 228.

BONDS.

See "ASSIGNMENTS"; "COURTS"; "VENDOR AND PURCHASER."

BOUNDARIES.

Before a court of equity will exercise its jurisdiction to determine a confused boundary, all persons interested, whether their estates are present or future, must be made parties. *Watkins v. Childs*, 99. Scope of jurisdiction to determine confused boundaries stated. *Ibid.* Foundations of jurisdiction to determine confused boundaries stated. *Ibid.*

Before a court of equity will appoint a commission to determine a confused boundary, there must exist some equity superinduced by the defendant, or a danger of a multiplicity of suits. *Ibid.*

Where the orator was entitled to some relief under the bill, the fact that necessary parties to the determination of one branch of the case were not joined did not make a demurrer to the whole bill good. *Ibid.*

In an equitable proceeding to determine a disputed boundary, it was necessary for the orator to show that some of the land in respect of which relief was sought was in the possession of the defendant. *Ibid.*

In an equitable proceeding to determine a disputed boundary, evidence examined, and *held* insufficient to establish a necessity for equitable interference. *Ibid.*

BREACH OF MARRIAGE PROMISE.

See "APPEAL AND ERROR" § 4.

Evidence respecting a letter written by plaintiff to defendant held admissible in a breach of marriage promise suit. *Massucco v. Tomassi*, 186.

In a breach of promise suit, *held* error to restrict defendant's testimony as to his pecuniary condition to the time of the promise. *Ibid.*

In a breach of promise suit, a failure to allege a right of action in Italy, where it was made, was performed, and was broken, *held* not to go to the jurisdiction of the subject-matter, but only to the sufficiency of the declaration. *Ibid.*

CARRIERS.**§ 1. Carriage of Passengers.**

Though a street car's collision with a wagon resulted from the driver's negligence in crossing the track, *held* that the company was liable to a passenger for her injury, if the motorman's negligence prevented him from avoiding the collision. *Strong v. Burlington Traction Co.*, 34.

Where a street car's collision with a wagon caused a passenger's injury, *held* that the motorman was not negligent as matter of law, for failure to ring the gong. *Ibid.*

The duty of the motorman to a street car passenger with reference to one driving a wagon along the street in the same direction as the car was moving stated. *Ibid.*

In an action against a street railway company for injury to a passenger caused by a collision with a wagon crossing the track, whether the motorman was negligent *held*, under the evidence, a question for the jury. *Ibid.*

A contract between a railroad company and an express company for the transportation of the latter's express matter and messengers *held* not within the rule forbidding a railroad company to stipulate against its liability for negligence. *Robinson v. St. J. & L. C. R. R. Co.*, 129.

An express messenger *held* not to have waived his right to assert the liability of a railroad company for injuries through negligence, merely because he entered the service of the express company with knowledge of a contract for his carriage existing between it and the railroad company. *Ibid.*

The fact that an express messenger on entering the service of an express company had some knowledge of an agreement between it and the railroad company covering his transportation did not charge him with knowledge of anything affecting his right of recovery against the railroad for injuries through its negligence. *Ibid.*

An express messenger, by accepting employment from an express company making it his duty to work on the trains of a railroad company, assumed, as regards the express company, the risks incident to his transportation. *Ibid.*

CASES.

(Specially Approved, Criticised or Distinguished).

- Arlington Mfg. Co. v. Mears*, 65 Vt. 414. (Distinguished). *Nicholas v. Nicholas' Est.*, 242.
- Baltimore & Ohio etc. R. R. Co. v. Voight*, 176 U. S. 498. (Approved and Followed). *Robinson v. R. R. Co.*, 129.
- Bradley v. Phillips*, 52 Vt. 517. (Distinguished). *Parker & Son v. Clemons*, 521.
- Briggs v. Nantucket Bank*, 5 Mass. 94. (Approved and Followed). *Massucco v. Tomassi*, 186.
- Chilsom v. N. E. Telephone & Telegraph Co.*, 176 Mass. 125. (Distinguished). *Drown v. N. E. Telephone & Telegraph Co.*, 1.
- Cunningham v. Coldbeck*, 63 Vt. 91. (Overruled). *U. S. v. U. S. Fidelity & Guaranty Co.*, 84.
- Davenport v. Hubbard*, 46 Vt., 200. (Approved and Followed). *Hubbard v. R. R. Co.*, 462.
- Davis v. R. R. Co.*, 55 Vt. 84. (Approved and Followed). *Kiley v. R. R. Co.*, 536.
- Dufur v. Boston & Maine R. R. Co.*, 75 Vt. 165. (Approved). *Robinson v. R. R. Co.*, 129.
- Farmers Mut. Ins. Co. v. Reynolds*, 52 Vt. 405. (Distinguished). *Nicholas v. Nicholas' Est.*, 242.
- Gay v. Horner*, 13 Pick. 535. (Approved and Followed). *Massucco v. Tomassi*, 186.
- Hard v. R. R. Co.*, 32 Vt. 473. (Disregarded, as having been overruled). *Kiley v. R. R. Co.*, 536.
- Holloway v. Barton*, 53 Vt. 300. (Distinguished). *Town of Ripton v. Town of Brandon*, 234.
- Hubbard v. Moore*, 67 Vt. 532. (Distinguished). *Town of Ripton v. Town of Brandon*, 234.
- Hubbard v. St. Louis etc. R. R. Co.*, 173 Mo. 249. (Distinguished). *Robinson v. R. R. Co.*, 129.
- In re Cowdry's Will*, 77 Vt. 359. (Explained and Distinguished). *Sheldon v. Wright*, 298.
- In re Joslyn's Est.*, 76 Vt. 88. (Distinguished). *In re Alice Howard's Est.*, 489.
- In re Polly Carey's Est.*, 49 Vt. 236. (Applied and Followed). *In re Harriet Peck's Est.*, 469.
- In re Sammon*, 79 Vt. 521. (Distinguished). *In re Bowers*, 175.

- Jackson v. Penn. R. R. Co.*, 66 N. J. L., 319. (Approved and Followed).
Robinson v. R. R. Co., 129.
Johnson v. Shumway, 65 Vt. 389. (Distinguished). *Nicholas v. Nicholas' Est.*, 242.
Leddy v. Barney, 139 Mass. 394. (Distinguished). *Robinson v. R. R. Co.*, 129.
Magoon v. R. R. Co., 67 Vt. 177. (Distinguished). *Douglas v. Carr*, 392.
Morrisette v. C. P. Ry. Co., 74 Vt. 232. (Approved and Followed).
Drown v. N. E. Telephone & Telegraph Co., 1.
Sawyer v. N. Am. Life Ins. Co., 46 Vt. 697. (Distinguished). *U. S. v. U. S. Fid. & Guar. Co.*, 84.
Seither v. Phil. Trac. Co., 125 Pa. St. 397. (Distinguished). *Robinson v. R. R. Co.*, 129.
Sias v. Consolidated Lighting Co., 73 Vt. 35. (Distinguished). *Drown v. N. E. Telephone & Telegraph Co.*, 1.
Sprigg's Admr. v. Rutland R. R. Co., 77 Vt. 347. (Distinguished).
Robinson v. R. R. Co., 129.
Tompkins v. City Hill St. R. R. Co., 66 Cal. 163. (Distinguished).
Robinson v. R. R. Co., 129.

CERTIFIED EXECUTION.

See "BANKRUPTCY" § 1.

The right to a close jail certificate does not depend on the finding of a jury, but on a supplemental finding by the court, which may be based on further evidence. *Flanders v. Mullin*, 124.

A close jail certificate may be had in all actions founded on tort, regardless of the allegations of the pleadings. *Ibid.*

Under V. S. 1751, the court at the time it renders judgment in a tort action, may adjudge not only that "the cause of action arose from the wilful and malicious act of the defendant," but that it was also "for wilful injuries to the person of the plaintiff." *Ibid.*

CERTIORARI.

Where contempt proceedings are taken to the Supreme Court by exceptions duly filed, and the exceptions are sufficient to bring up the full record, a writ of certiorari is unnecessary. *In re Consolidated Rendering Co.*, 55.

CHARGE OF COURT.

See "APPEAL AND ERROR"; "NEGLECTANCE"; "PHYSICIANS AND SURGEONS";
"TRIAL" § 3.

CLOSE JAIL CERTIFICATE.

See "CERTIFIED EXECUTION"; "BANKRUPTCY" § 1.

CLOUD IN TITLE.

See "QUIETING TITLE."

COLLATERAL INHERITANCE TAX.

See "TAXATION" § 2.

COMMERCE.

See "POLICE POWER."

Regulations prescribed by the Secretary of Agriculture for the inspection, disposition, etc., of cattle, sheep, etc., and the carcasses and meat food products thereof, not inconsistent with Act of Congress of June 30, 1906, authorizing such regulations, *held* to have the force of federal law. *State v. Peet*, 449.

Certain federal regulations *held* to authorize by implication the use in interstate commerce of carcasses of calves over three weeks of age when killed. *Ibid.*

Articles recognized by Congress as subjects of interstate commerce must be conclusively presumed to have that status. *Ibid.*

Commerce among the states includes intercourse for the purposes of trade in any and all its forms, including the purchase, sale, and exchange of commodities between the citizens of different states. *Ibid.*

The power conferred on Congress by the Commerce clause of the Constitution to regulate interstate commerce is unlimited. *Ibid.*

To regulate commerce is to prescribe the rules by which it shall be governed (that is, the conditions on which it shall be conducted), to determine how far it shall be free, how far it shall be subject to duties and other exactions, and how far it shall be prohibited. *Ibid.*

So much of No. 182, Acts 1906, as makes it punishable to keep with intent to ship out of the State for food purposes the flesh of a calf

which was less than four weeks old or weighed less than 50 pounds dressed weight when killed, *held* void, as conflicting with the commerce clause of the U. S. Constitution. *Ibid.*

That part of No. 182, Acts 1906, making it punishable to keep with intent to sell for food purposes the flesh of a calf under a specified age or weight when killed, *held* not invalid, as conflicting with the commerce clause of the U. S. Constitution. *Ibid.*

COMMON COUNTS.

All the common counts are founded on implied promises to pay money in consideration of antecedent debts. *Parker & Son v. Clemons*, 521.

Defendant *held* not liable in assumpsit on the common counts, nor on an account stated, for promising to reimburse plaintiff for injuries to his goods caused by negligence. *Ibid.*

CONFIDENTIAL RELATION.

See "APPEAL AND ERROR" § 4; "ATTORNEY AND CLIENT"; "CONTRACTS" § 1; "PRINCIPAL AND AGENT" § 2.

CONSTITUTIONAL LAW.

See "COMMERCE"; "POLICE POWER."

§ 1. Personal, Civil, and Political Rights.

A corporation is a "person" within the meaning of the due process clause and of the equality clause of the Federal Constitution. *Lawrence v. Rutland R. R. Co.*, 370.

No. 117, Acts 1906, requiring certain corporations to pay their employees weekly in lawful money *held* not, as to a railroad corporation, in contravention of the declaration of the Bill of Rights that all men have certain inalienable rights amongst which are the acquiring and protecting of property, and that every member of society hath a right to be protected in the enjoyment of life, liberty and property. *Ibid.*

Nor is the above Act invalid as restricting the rights of railroad employees to contract with their employer; such restriction not being direct, but resulting from the restriction of the employer's right, and the restriction as to the employer being valid. *Ibid.*

§ 2. Vested Rights.

Congress has express power to enact bankruptcy laws directly impairing the obligation of contracts, and it may pass laws in execution of other powers expressly given, which incidently have that effect, but other than this, it has no constitutional power to impair or destroy vested rights. *U. S. v. U. S. Fidelity & Guaranty Co.*, 84.

The destruction of vested rights by implication is unfavored in law, and is not to be admitted, unless the implication is so clear as to be equivalent to an explicit declaration. *Ibid.*

§ 3. Obligation of Contracts.

The "obligation" of a contract is the law that binds the parties to perform their agreement. *U. S. v. U. S. Fid. & Guaranty Co.*, 84.

§ 4. Equal Protection of Laws.

No. 75, Acts 1906, providing that any corporation doing business in this State may be required to produce its books and papers pertaining to certain matters before tribunals acting under the authority of the State, *held* not contrary to the Fourteenth Amendment of the U. S. Constitution as discriminating between artificial and natural persons. *In re Consolidated Rendering Co.*, 55.

No. 117, Acts 1906, requiring certain corporations to pay their employees weekly in lawful money, *held* not, as to a railroad corporation, a denial of the equal protection of the laws in violation of Constitution U. S., Amendment 14. *Lawrence v. Rutland R. R. Co.*, 370.

Nor is the above Act subject to the objection that it cannot operate alike upon all within its provisions because it includes foreign corporations, since, though charters of foreign corporations cannot be amended, such corporations are as amenable to the laws of the state as are domestic corporations. *Ibid.*

§ 5. Due Process of Law.

No. 75, Acts 1906, providing that a corporation doing business in this State may be compelled to produce its books and papers pertaining to certain matters before certain tribunals, *held* not to violate the Fourteenth Amendment of the U. S. Constitution in that it provides no compensation for trouble and expense of producing documents. *In re Consolidated Rendering Co.*, 55.

No. 75, Acts 1906, providing that a corporation doing business in this State may be compelled to produce its books and papers pertaining to certain matters before certain tribunals, and providing punishment for contempt for noncompliance with such order, *held* not contrary to the Fourteenth Amendment of U. S. Constitution as depriving the corporation of its property without due process of law. *Ibid.*

No. 117, Acts 1906, requiring certain corporations to pay their employees weekly in lawful money, *held* not, as to a railroad corporation whose charter was subject to amendment, a deprivation of property without due process of law in violation of Constitution U. S., Amendment 14. *Lawrence v. Rutland R. R. Co.*, 370.

§ 6. Searches and Seizures.

An order issued under No. 75, Acts 1906, directing a corporation to produce before a grand jury certain books and papers, *held* to be in effect the same as a subpoena *duces tecum*, and not an unreasonable search or seizure in violation of U. S. Constitution, Art. 11. *In re Consolidated Rendering Co.*, 55.

Under No. 75, Acts 1906, providing that a corporation may be required to produce books and papers in certain proceedings under certain conditions, and providing for punishment for noncompliance, and for proceedings for contempt for violation of the order, *held* not infringements of U. S. Constitution, Art. 11, as unlawful search and seizure on account of the fact that no tender of fees and expenses was made. *Ibid.*

No. 75, Acts 1906, providing that corporations doing business in this State may be compelled to produce books and papers in their possession under certain conditions, *held* not to contravene U. S. Constitution, Art. 11, relating to search and seizure of property. *Ibid.*

CONTEMPT.

See "APPEAL AND ERROR" § 1; "CONSTITUTIONAL LAW" § 5; "HABEAS CORPUS."

§ 1. Power to Punish and Proceedings Therefor.

Under the provisions of No. 75, Acts 1906, the county court has jurisdiction to fine a corporation for contempt for violation of an order to produce books and papers before the grand jury in an investiga-

tion of an alleged breach of a criminal statute by citizens of this State. *In re Consolidated Rendering Co.*, 55.

The only question that can arise in the Supreme Court on the review of a contempt proceeding, where the discretion of the lower court is fairly exercised, is as to the jurisdiction of the lower court. *Ibid.*

In contempt proceedings against a corporation for failure to obey an order to produce certain books and papers *held*, that the question of privilege on account of tendency to criminate could not be raised by motion to dismiss the petition. *Ibid.*

CONTRACTS.

See "ACTION"; "CARRIERS" § 1; "RELEASE."

§ 1. Requisites and Validity.

Wherever a fiduciary or confidential relation exists between the parties to a deed, gift, contract, or the like, which gives the person confided in an advantage over the other, equity casts upon the former the burden of showing absolute fairness on his part, and freedom of the other from undue influence. *Hobart's Admr. v. Vail*, 152.

CONTRACTORS' BONDS.

See "COURTS."

CORPORATIONS.

See "CONSTITUTIONAL LAW" §§ 4, 5; "EVIDENCE" §§ 4, 6; "SCHOOLS AND SCHOOL DISTRICTS"; "STATUTES, CONSTRUCTION OF"; WITNESSES.

§ 1. Officers and Agents.

Corporations are bound by the acts of their officers within the ordinary line of their duty, without a formal vote conferring such authority. *Jaquith Co. v. Shumway's Est.*, 556.

§ 2. Foreign Corporations.

A foreign corporation that has complied with the provisions of law entitling it to do business in this State, so far as pertains to the business done here and all matters connected therewith, is amenable to the laws of this State as though it were a domestic corporation. *In re Consolidated Rendering Co.*, 55.

The books and papers of a foreign corporation pertaining to the business done in this State under the authority of its laws, which are required as evidence in legal proceedings therein, though taken without the State, are still within the jurisdiction of its courts in contemplation of law. *Ibid.*

§ 3. Incorporation and Organization.

A reservation in a corporate charter or in the general law of power to amend or repeal *held* to place under legislative control all rights derived from the state, but not rights not constituting a part of the contract of incorporation. *Lawrence v. Rutland R. R. Co.*, 370.

A corporation is a "person" within the meaning of the due process clause and of the equality clause of the Federal Constitution. *Ibid.*

COURTS.

Jurisdiction, see "PLEADING" § 1; "UNITED STATES."

Act of Congress, Feb. 4, 1905, amending Act, Aug. 13, 1894, in relation to contractors' bonds, *held* not to preclude an action on such bond to the United States in a state court. *U. S. v. U. S. Fid. & Guarantee Co.*, 84.

A declaration *held* to show a cause of action on a contractor's bond of which the courts of Vermont had jurisdiction. *Ibid.*

Where only a part of the facts constituting a cause of action accrued in this State, our courts have jurisdiction. *Ibid.*

COVENANT, ACTION OF.

See "PLEADING" § 2.

COVENANTS.

See "LANDLORD AND TENANT" § 2.

An entry by a city under an agreement giving it five feet of land for the widening of a street, if made after the time limited for the entry, *held* not a breach of the owner's covenant in a conveyance of the land. *Fleet v. Watt*, 177.

An agreement *held* not to constitute an incumbrance within a covenant against incumbrances in a deed. *Ibid.*

CRIMINAL LAW.

See "ABORTION"; "INTOXICATING LIQUORS"; "JUDGMENTS"; "PERJURY";
"STATUTES, CONSTRUCTION OF."

The common law crime of misprision of felony is in force in this State.
State v. Wilson, 249.

Misprision of felony at common law defined. *Ibid.*

An information for misprision of felony is insufficient, unless it alleges
that the respondent intended to hinder the course of justice and to
cause the felon to escape unpunished. *Ibid.*

Where a police regulation penalizes an act or omission that might
otherwise be done or omitted without culpability, intention is not
an element of the offence. *State v. Gilmore*, 514.

DAMAGES.

In case in two counts for negligence, where one count is bad and the
agreed facts show that the neglects charged in both counts damaged
plaintiff in a certain amount, but do not apportion the damages
between the counts, plaintiff is entitled to nominal damages only.
Marsh v. Rutland R. R. Co., 397.

A special issue, limiting damages to those set out in the declaration,
held not made by the fact that defendant conceded the right of
recovery, but denied the claim of damages, both in character and
extent, in manner and form alleged; but the issue was that made
by the pleadings, and defendant, by letting in irrelevant testimony
without objection, waived the right to object. *Hubbard v. Rutland
R. R. Co.*, 462.

DEEDS.

See "COVENANTS"; "ESCROW"; "EXECUTORS AND ADMINISTRATORS";
"MORTGAGES"; "VENDOR AND PURCHASER."

Though no title can be founded on a deed that is absolutely void, a
deed that is voidable only may convey a perfect title. *Tudor v.
Tudor*, 220.

DEER.

See "GAME LAWS."

DIVORCE.

In a suit for divorce on the ground of adultery, the adultery may be proved by such circumstances as will lead the guarded discretion of a reasonable man to the conclusion that the offence was committed. *Taft v. Taft*, 256.

Where, in a suit for divorce on the ground of adultery, the court found that the adultery had been committed on two occasions, and also found an adulterous disposition, evidence of other times when the parties were alone in a room was admissible, whether before or after the occasion proved. *Ibid.*

The testimony of a private detective employed by the wife seeking a divorce on the ground of adultery, is to be weighed like other testimony, and the fact that a witness is a hired witness should be considered in weighing the evidence. *Ibid.*

Where, in a suit for divorce on the ground of adultery, there was evidence to show adultery, the weight and sufficiency thereof were for the trial court, and the Supreme Court cannot review its findings. *Ibid.*

The measure of proof in a suit for divorce on the ground of adultery is a preponderance of the evidence, weighing the presumption of innocence in favor of the party accused. *Ibid.*

DOGS.

See "GAME LAWS."

DOMICILE.

See "UNITED STATES."

DUE PROCESS OF LAW.

See "CONSTITUTIONAL LAW" § 4.

ELECTION.

Where the acts of a person bound to elect between two courses do not show a choice of either to the exclusion of the other, there can be no election. *In re Harriet Peck's Est.*, 469.

EMINENT DOMAIN.

Under V. S. 3809, 3814, 3816, and No. 141, Acts 1868, relating to condemnation of property by railroads, a defective record of the loca-

tion of the railroad right of way *held* to render the condemnation proceedings void. *Post v. Rutland R. Co.*, 551.

The location determined upon must be ascertained from the survey of record, unaided by extrinsic evidence. *Ibid.*

Where a railroad company claims the right to take a person's land under the power of eminent domain, it must show that the condemnation proceedings on which it relies were had strictly in compliance with the provisions of law. *Ibid.*

EQUITY.

See "ASSIGNMENTS"; "BOUNDARIES"; "CONTRACTS" § 1; "INJUNCTION"; "MORTGAGES"; "NUISANCES"; "QUIETING TITLE"; "SPECIFIC PERFORMANCE"; "TRUSTS"; "VENDOR AND PURCHASER";
"WATERS AND WATER COURSES."

§ 1. Jurisdiction, Principles, and Maxims.

Where a grantor, who had deposited a deed in escrow, later and before the deed was delivered, conveyed the land to another, the original grantee's proper remedy is in equity. *Wilkins v. Somerville*, 48.

A court of equity will not take jurisdiction, under No. 40, Acts 1896, of a bill for the construction of a will, brought by a devisee pending her appeal from the probate court's final decree of distribution involving that question. *Hall v. Lawton*, 535.

§ 2. Parties and Process.

Where the bill makes no case against certain defendants as selectmen until an amendment after the expiration of their terms, the bill will be dismissed as to them with costs on appeal. *North Troy Graded School District v. Town of Troy*, 16.

The rule for the construction of equity pleadings is, that their language shall be understood according to its natural import in connection with the subject-matter; that in equipoise the construction is to be against the pleader; and that no intendments are to be made in favor of the pleader that do not naturally result from the facts alleged. *Quinn v. Valiquette*, 434.

ESCROWS.

See "EQUITY" § 1; "INJUNCTION"; "VENDOR AND PURCHASER."

A grantor, who had deposited a deed in escrow for delivery to the grantee, could annex such conditions to its delivery as he chose, and the title could not pass by it without a compliance with those conditions. *Wilkins v. Somerville*, 48.

A contract for the delivery of a deed to a bank held not objectionable as uncertain. *Ibid.*

Where a deed deposited in escrow for delivery upon the payment of a certain sum by the grantee was withdrawn by the grantor before a reasonable time had elapsed for the payment of the money, held that the grantee has a reasonable further time in which to perform the condition. *Ibid.*

A deed deposited in escrow and delivered by the depository without performance of a stated condition precedent, held ineffective. *Dunlevy v. Fenton*, 505.

ESTOPPEL.

See "LIMITATION OF ACTIONS"; "WATERS AND WATER COURSES."

An orator held not estopped by conduct to claim a proper share of the income from certain trust funds. *North Troy Graded School Dist. v. Town of Troy*, 16.

He who relies on an estoppel *in pais* must show an expressed or implied representation and reliance and action thereon to his injury, in ignorance of the truth. *Royce v. Carpenter*, 37.

An upper millowner held not estopped by acquiescence or laches from asserting his rights against a lower millowner because of his water power being injured by back water. *Ibid.*

Nothing can work an equitable estoppel, unless it appears that it was relied upon. *Quinn v. Valiquette*, 434.

In order that a person be estopped by an inquiry as to his right or interest in property, it must appear that he knew the purpose of the inquiry, whether the inquirer had such an interest as entitled him to make the inquiry, and that the answer would be relied upon. *Ibid.*

EVIDENCE.

See "APPEAL AND ERROR" §§ 2, 4; "MASTER AND SERVANT" § 1; "MORTGAGES" § 3; "PHYSICIANS AND SURGEONS"; "DIVORCE"; "TRIAL" § 1; "WILLS" § 2; "WITNESSES" § 2.

§ 1. Judicial Notice.

That which is known need not be proved, and so it need not be proved that a severe injury to the hand causes pain. *Bolton v. Ovitt*, 362.

§ 2. Presumptions.

In an action against a physician for malpractice, there is no presumption of law in the nature of evidence that the physician had and exercised the requisite care and skill, nor that he did his duty in treating the case. *Sheldon v. Wright*, 298.

Nor is there any presumption of the physician's negligence. *Ibid*.

There are probative presumptions, and there are rules of law frequently called presumptions, which are merely *locative*, and without probative force,—their office being performed when they have placed on the respective parties their appropriate duties. *Ibid*.

A true legal presumption is in the nature of evidence, and is to be weighed as such. *Ibid*.

Where parties to a written contract entered into a verbal agreement, and the only issue is whether they agreed on new terms or to continue under the old contract, there was no presumption of the continuance of the written contract. *Cate v. Fife & Child*, 404.

In an action by a railroad conductor for injuries from the ladder on a car giving way as he was climbing it, although the burden of proof as to negligence is on plaintiff, there is no presumption that the ladder was sufficient. *Kiley v. Rutland R. R. Co.*, 536.

§ 3. Burden of Proof.

The burden of proving an issue never shifts, but constantly rests on the party who substantially asserts the affirmative thereof. *Harri-son's Admr. v. Ins. Co.*, 148.

A plea of full performance to a declaration in covenant admits all matters well alleged and casts on defendant the burden of proving performance. *Drouin v. Wilson*, 335.

In an action for injuries to a servant, the burden of proving nonassumption of risk is on plaintiff. *Bolton v. Ovitt*, 362.

In a suit in chancery by a town for an accounting and for the recovery of trust funds alleged to be held by defendant as its treasurer, the burden of establishing the amount for which defendant should account is on the orator, and the burden of accounting therefor is on defendant. *Town of Brookfield v. Bigelow*, 428.

A plaintiff need not prove more than is necessary to his recovery, though more be alleged. *Snyder v. Parmelee*, 496.

In trover by a corporation for a horse sold by a tax collector as the property of an officer of the corporation, the burden of proof is on the corporation to establish its ownership. *Jaquith Co. v. Shumway's Est.*, 556.

§ 4. Relevancy, Materiality, and Competency in General.

Where a plaintiff, in establishing his case, is not required to disclose an illegal contract to which he is a party, and which his adversary subsequently produces and relies on in defence, the plaintiff may, in rebuttal, impeach the transaction for such illegality. *Harrison's Admr. v. Ins. Co.*, 148.

The acts and declarations of two parties, concurring in the continued recognition and execution of a course of dealing involving the interests of both, are evidence tending to establish a previous understanding to that effect. *Hobart's Admr. v. Vail*, 152.

Evidence held not to show that an attorney retained in bad faith money collected, as bearing on his right to compensation. *Davis v. Farwell*, 166.

Evidence offered by defendant in an action for attorney fees, as to former suits on the same matter, to show harassment, held immaterial. *Ibid.*

Evidence respecting a letter written by plaintiff to defendant held admissible in a breach of promise suit. *Massucco v. Tomassi*, 186.

The mere fact that the answer of a witness is not responsive does not make it inadmissible. *Ibid.*

In an action against a railroad company for setting a fire by sparks from its locomotives, evidence of the finding fourteen months later of embers at the point where the fire is alleged to have been started was admissible. *Smith v. C. V. Ry. Co.*, 208.

Admissibility of evidence in an action against a railroad company for a fire loss as to character of engines used determined. *Ibid.*

In an action against a railroad company for a fire loss, evidence of a fire subsequently started held admissible. *Ibid.*

- In an action against a railroad company for setting a fire, certain evidence *held* admissible as tending to show the force of the wind when the fire occurred. *Ibid.*
- In an action against a railroad company for setting a fire by sparks from its locomotives evidence showing defective character of defendant's locomotives *held* admissible. *Ibid.*
- A note purporting to have been indorsed by the payee to claimant's testatrix *held* inadmissible against the maker's estate without proof that the indorsement was made by the payee or by his authority. *Church's Exr. v. Church's Est.*, 228.
- In a suit for divorce on the ground of adultery, evidence of other occasions besides those relied on, whether prior or subsequent thereto, are admissible to show an adulterous disposition. *Taft v. Taft*, 256.
- In an action by an employee for being kicked by his employer's horse, based on the ground that the horse had the habit of kicking which was known to defendant, evidence of previous acts of viciousness is admissible. *Morgan v. Hendrick*, 284.
- Photographs showing a horse hitched to a carriage and standing at rest, offered to show its conduct while in harness and to show its disposition, are not admissible to disprove that the horse had the habit of kicking. *Ibid.*
- In a personal injury action, defendant *held* entitled to ask a surgeon produced by plaintiff certain questions relating to the condition of the bones of plaintiff's leg. *Ibid.*
- In an action for malpractice in setting a broken leg, evidence of plaintiff that he could not travel on the leg as formerly *held* admissible. *Sheldon v. Wright*, 298.
- In an action against a physician for malpractice, evidence of plaintiff's brother that he furnished plaintiff money to go to see another doctor *held* not prejudicial as being an appeal to the jury's sympathy. *Ibid.*
- In an action against a physician for malpractice, evidence of plaintiff's the requirements of good surgery *held* admissible. *Ibid.*
- A fictitious or suppositional question as to the admissibility of evidence will not be considered by the Supreme Court. *State v. Webster*, 391.
- In an action for conversion, certain evidence offered to show that defendant did not own the property *held* properly excluded. *Cate v. Fife & Child*, 404.
- In an action of trover, where defendants admit the conversion, unless they establish their ownership, plaintiff's evidence that defendants,

in a former suit by them to foreclose a mortgage on the property, threatened plaintiff with arrest if he took part of it, is immaterial on the question of defendants' conversion. *Ibid.*

In a prosecution for attempting to poison certain persons, evidence as to another offence *held* admissible where the motive and purpose of such offence was common to both. *State v. Sargood*, 412.

Allowing evidence to come in without objection *held* a waiver of right to object that it was not admissible under the pleadings. *Hubbard v. Rutland R. R. Co.*, 462.

In assumpsit for money loaned, the pecuniary condition of the parties *held* admissible to discredit the defence. *Lincoln v. Hemenway*, 530.

The statement of a witness testifying as to the pecuniary condition of a party *held* to indicate that it referred to the party's financial condition, and its admission was not erroneous because of the possibility that it meant something else. *Ibid.*

On the issue whether an accident to a party occurred during a designated month or several months before, the testimony of a witness that she did not hear of the accident until the latter part of the month was admissible. *Ibid.*

On the issue as to the ownership of a horse claimed by the plaintiff corporation, the fact that the corporation had failed to file a tax inventory including the horse as its property, in pursuance of V. S. 405, is admissible to show that the corporation did not own the horse. *Jaquith Co. v. Shumway's Est.*, 556.

In trover for a horse, certain evidence *held* admissible as bearing on the value of the horse. *Ibid.*

In trover by a corporation against a tax collector for the conversion of a horse, certain evidence *held* immaterial to the issue. *Ibid.*

In trover for a horse, the answers of a witness to questions propounded construed, and *held* not to render his evidence inadmissible on the ground that he was giving his personal knowledge of the transaction, when, in fact, he had no personal knowledge. *Ibid.*

§ 5. Declarations.

In an action against a physician for malpractice, evidence of plaintiff's daughter as to his complaints and doings in regard to his injured leg *held* admissible. *Sheldon v. Wright*, 298.

In an action against a physician for malpractice, evidence of plaintiff's wife as to his complaints when standing on his injured leg *held* not objectionable as self-serving declarations. *Ibid.*

Declarations are admissible as a part of the *res gestæ* only when they grow out of and elucidate a principal and material fact, are contemporaneous therewith, and derive some degree of credit therefrom. *State v. Ryder*, 422.

In a prosecution for attempting to produce a miscarriage causing death, certain declarations of the deceased *held* admissible. *Ibid.*

§ 6. Documentary Evidence.

If a foreign corporation doing business in this State under the authority of its laws chooses to remove its books and papers from the State in anticipation of being called on to produce them in proceedings against citizens of the State, it should not be permitted to plead its wrong as an excuse for not obeying an order to produce them. *In re Consolidated Rendering Co.*, 55.

Whether documentary evidence is relevant, or if produced would tend to criminate the witness, is for the court, and not for the witness to determine. *Ibid.*

Testimony of eyewitnesses to a marriage is better evidence thereof than the record authenticating it, as that may need further evidence to identify the parties. *Massucco v. Tomassi*, 186.

Photographs may be verified and used in evidence in the same manner as maps or other diagrams. *Smith v. C. V. Ry. Co.*, 208.

The quadrennial appraisal of the taxable real estate in a town, verified and filed according to law, is a public document and admissible in evidence on the question of the value of such real estate. *Town of Ripton v. Town of Brandon*, 234.

On an issue as to the value of a pauper's interest in certain real estate, an offer of proof of the listed value of such real estate for taxation for certain years *held* properly refused as an offer to show the contents of the list by parol. *Ibid.*

A certified copy of the record of the assignment of a mortgage is admissible as evidence of the assignment, no objection being made to the form of the certificate. *Davenport v. Davenport*, 400.

In an action of trover, a tax inventory of defendant's showing a certain amount due them from solvent debtors, was inadmissible on the question of the ownership of the property, where it did not appear that plaintiff was a solvent debtor when the inventory was made. *Cate v. Fife & Child*, 404.

Where, in an action of trover, the issue was whether the parties were governed by a verbal agreement or a prior written contract, defendants' books containing accounts between the parties are ad-

missible to show whether plaintiff had been credited with items to which he would be entitled under the written contract. *Ibid.*

On the issue as to the ownership of a horse claimed by a corporation, a tax list filed by an officer of the corporation, in which he had listed the horse as his own, *held* inadmissible against the corporation. *Jaquith v. Shumway's Est.*, 556.

Book entries and a bill of sale, by which a witness testified as to the facts of the purchase of a horse, *held* admissible in connection with witness's testimony, but not as independent evidence of the purchase. *Ibid.*

A bill of sale introduced in evidence to show the ownership of a horse *held* inadmissible, where there was no proof of its execution. *Ibid.*

§ 7. Parol or Extrinsic Evidence Affecting Writings.

Where a bill in equity charged the invalidity of certain assignments executed by testatrix to the defendant, who occupied a confidential relation toward her, as he was therefore required to sustain their validity, he was entitled to show by parol that the action of the testatrix was consistent with her previous tendencies and purposes. *Hobart's Admr. v. Vall*, 152.

Where memoranda given by testatrix to another from which to draw a will that was destroyed on the execution of a subsequent will, had been themselves destroyed, oral proof of their contents was admissible. *In re Rogers' Will*, 259.

In an action on an accident policy, parol evidence *held* admissible to aid in determining the meaning of words therein. *Ward's Admr. v. Ins. Co.*, 321.

Rule of a railroad company considered, and *held* not to make a conductor guilty of contributory negligence as matter of law in not inspecting cars on the trip like a car inspector. *Kiley v. Rutland R. Co.*, 536.

Where the record of the location of a railroad right of way, under V. S. 3809, 3814, 3816, is defective, parol evidence is inadmissible to vary the record. *Post v. Rutland R. R. Co.*, 551.

§ 8. Opinion Evidence.

In an action for injuries to a railroad employee alleged to have been caused by a defective switch, the court properly permitted an expert to testify concerning the effect that a switch in the condi-

tion of that in controversy would have on a train running over it. *Place v. Grand Trunk Ry. Co.*, 196.

Medical testimony explaining the condition of a broken bone, as shown in an X-ray picture, *held* admissible. *Sheldon v. Wright*, 298.

In an action against a physician for malpractice in caring for a broken leg, there can be no recovery without medical expert testimony tending to show want of the requisite care or skill. *Ibid.*

A carpenter of thirty years' standing, with some experience in setting and repairing plate glass, *held* properly allowed to give his opinion as to the cause of a break in a plate glass window. *Drouin v. Wilson*, 335.

On the issue as to the ownership of a horse, a witness may not give his opinion as to whose horse it was, where he had no knowledge on the subject, except through the books of a corporation of which he was the treasurer. *Jaquith Co. v. Shumway's Est.*, 556.

§ 9. Weight and Sufficiency.

In an action against a railroad company for setting a fire, evidence *held* sufficient to show that the fire was started by sparks from one of defendant's locomotives. *Smith v. C. V. Ry. Co.*, 208.

In an action against a railroad company for setting a fire by sparks from its locomotives, certain proof *held* not essential. *Ibid.*

Evidence that testatrix, having received certain notes against her husband indorsed to her by her father, bequeathed the interest on the notes accruing during her husband's life to him, *held* sufficient to establish her ownership of the notes, and to entitle her executor to recover against her husband's estate on the common counts. *Church's Exr. v. Church's Est.*, 228.

In either a civil or criminal proceeding adultery may be proved by mere circumstantial evidence. *Taft v. Taft*, 256.

Where, in a suit for divorce on the ground of adultery, there was evidence to show adultery, the weight and sufficiency thereof were for the trial court, and the Supreme Court cannot review its findings. *Ibid.*

Certain testimony in an action for injuries to an employee *held* not sufficient to lay the foundation for an inference that he did not assume the risk. *Hatch v. Reynolds's Est.*, 294.

In an action against a physician for malpractice in a case of a surgical operation, there cannot be a recovery without medical expert testimony tending to show lack of the requisite care and skill on defendant's part. *Sheldon v. Wright*, 298.

- In an action for assault by a railroad car cleaner on a mail agent, evidence that plaintiff was not in favor with the railroad officials was insufficient to connect them or the railroad company with the assault. *Douglas v. Carr*, 392.
- In a prosecution for attempting to produce a miscarriage, causing death, certain letters written by the deceased *held* sufficiently proved to be used as standards of comparison. *State v. Ryder*, 422.
- Evidence *held* to authorize a finding that a conductor, who mounted a moving car and was injured by a round of a ladder giving way as he was climbing it, was free from contributory negligence. *Kiley v. Rutland R. R. Co.*, 536.
- Evidence *held* to authorize a finding that an inspector of cars was negligent. *Ibid.*
- Evidence *held* to support allegation of the declaration that the mounting of a moving train by a conductor, in doing which he was injured, was one of his duties. *Ibid.*

EXCEPTIONS, BILL OF.

See "APPEAL AND ERROR" §§ 3, 4.

EXCEPTIONS, BILL OF.

See "DEEDS"; "LIMITATION OF ACTIONS."

- Where a will authorized the executors to sell real estate of which the testator died seized, such executors, upon the probate of the will, became donees of a common law power, independent of their functions as executors, by which they could vest title to such real estate in a purchaser; and the source of that power is not the probate court, but the testator. *Tudor v. Tudor*, 220.
- A conveyance of land in this State by such executors under a foreign will, before probate here, is a defective execution of the power; but a subsequent probate here relates back and cures the defect. *Ibid.*
- A wife holding certain notes against her husband having bequeathed the interest thereon to him for life, her executor was entitled to possession and control of the notes, but not to collect them during that period. *Church's Exr. v. Church's Est.*, 228.

FALSE IMPRISONMENT.

An act of an officer arresting one *held* an abuse of process, making him a trespasser *ab initio* and rendering him liable for false imprisonment. *Wright v. Templeton*, 358.

FRAUDULENT CONVEYANCES.

A purchaser from a fraudulent grantee *held* not bound by a decree in favor of creditor of the grantor. *Tudor v. Tudor*, 220.

The words "null and void" in the statute against fraudulent conveyances, V. S. 4965, mean *voidable* only. *Ibid*.

GAME LAWS.

An inhabitant of this State *held* to have no such property in wild deer on his enclosed land that he may kill dogs attacking them in the close season. *Zonetti v. Bolles*, 345.

Facts *held* insufficient to show one guilty of permitting a dog unlawfully to run at large in a forest inhabited by deer. *State v. Zonetti*, 348.

GRAND JURY.

A grand jury is a part of the court, and any question of privilege can be raised before that body, and reported to the court for its consideration. *In re Consolidated Rendering Co.*, 55.

GIFTS.

See "PRINCIPAL AND AGENT" § 2; "WILLS."

Where the share of a testatrix in a portion of another estate was being held by executors thereof by her permission subject only to burden imposed by her own act, in determining the validity of a gift by her of this fund, the rule regarding the transfer of expectancies does not apply. *Hobart's Admr. v. Vail*, 152.

Where the assignment of household goods and chattels was made in consideration of gratitude for services rendered, and was not under seal, *held* that it should be treated as a gift. *Ibid*.

Where a gift of household goods and personal chattels was not accompanied by a delivery of same, either actual or constructive, and the giver continued to use them until her death, the gift was ineffectual. *Ibid*.

Prima facie, every gift, whether by will or otherwise, is supposed to be beneficial to the donee, and he is presumed to assent thereto, though ignorant of the transaction. *Church's Est. v. Church's Est.*, 228.

HABEAS CORPUS.

V. S. 1610, providing that one fined for contempt shall be entitled to a writ of habeas corpus, has no application to a case where the penalty imposed is merely a fine. *In re Consolidated Rendering Co.*, 55.

HUSBAND AND WIFE.

See "JUDGMENTS"; "NEW TRIAL"; "WILLS" § 2; "WITNESSES" § 1.

IMPRISONMENT.

For intoxication, see "STATUTES, CONSTRUCTION OF."

INCUMBRANCES.

See "COVENANTS."

INDICTMENT AND INFORMATION.

An information for misprision of felony *held* not defective in allegations respecting respondent's knowledge. *State v. Wilson*, 249.

An information for misprision of felony is insufficient, unless it alleges that respondent intended to hinder the course of justice and to cause the felon to escape unpunished. *Ibid.*

Where an evil intent accompanying the act is necessary to constitute such act a crime, that intent must be alleged in the indictment or information. *Ibid.*

Where an indictment or information charges only a misdemeanor, if time and place be added to the allegation charging the first act, it will be deemed to be connected with all the subsequent allegations of fact. *State v. Peet*, 449.

INFANTS.

See "MASTER AND SERVANT."

INJUNCTION.

Where a grantor who had deposited a deed in escrow, withdrew it before a reasonable time had elapsed for the payment of the purchase money by the grantee, and conveyed the land to another, it was proper, in a suit for specific performance, to issue a temporary injunction holding the deed and title to the property in *statu quo*. *Wilkins v. Somerville*, 48.

INSURANCE.

See "APPEAL AND ERROR" § 4; "PLEADING" § 1; "EVIDENCE" § 7; "TRIAL" § 3.

§ 1. Insurance Agents and Brokers.

The knowledge of the general agent of an insurer, at the time of taking an application for a policy, is the knowledge of the insurer. *Ward's Admr. v. Ins. Co.*, 321.

§ 2. Assignment of Policy.

In an action on a life insurance policy, plaintiff *held* entitled to impeach an alleged assignment thereof by showing the turpitude of the consideration therefor. *Harrison's Admr. v. Ins. Co.*, 148.

§ 3. Actions on Policies.

In an action on an accident policy, a part of an application therefor *held* inadmissible. *Ward's Admr. v. Ins. Co.*, 321.

In an action on an accident policy, a finding that insured was killed by accidental means within the policy *held* warranted. *Ibid.*

A provision in an accident policy *held* not to defeat recovery thereon. *Ibid.*

In an action on an accident policy, the court *held* not warranted in directing a verdict for insurer on a specified ground. *Ibid.*

In an action on an accident policy, an instruction *held* not erroneous as ignoring evidence. *Ibid.*

In an action on an accident insurance policy an instruction *held* sufficiently favorable to defendant. *Ibid.*

A finding that the insured was under the influence of intoxicants, so as to prevent him from being fairly able to take care of himself, *held* a finding that he was "under the influence" of intoxicants within the provision of the policy limiting recovery in such a case. *Furry's Admr. v. General Acc. Ins. Co.*, 526.

An exception of uncertain import in an insurance policy is to be construed most strongly against the insured; but an unambiguous exception should not be abridged by construction. *Ibid.*

A provision in an insurance policy limiting the amount of recovery if the insured is under the influence of intoxicants or narcotics when injured is not unreasonable. *Ibid.*

INTEREST.

Where a school district improperly received funds as a beneficiary, *held* that it should pay interest thereon from the time it was made a party to an action to recover the funds. *North Troy Graded School Dist. v. Town of Troy*, 16.

INTOXICATING LIQUORS.

In a prosecution under No. 115, Acts 1904, §§ 20, 23, a licensee *held* criminally liable for a sale made to a minor by respondent's bartender while carrying on the licensed business. *State v. Gilmore*, 514.

In a prosecution under §§20, 23, No. 115, Acts 1904, for illegally selling intoxicating liquors, intent is not an essential ingredient of the offence. *Ibid.*

JUDGMENTS.

See "ATTORNEY AND CLIENT"; By default, see "NEW TRIAL"; "PERJURY." Motion in arrest, see "APPEAL AND ERROR" § 3.

When counts are for different causes of action, and some of them are bad and the verdict general, with nothing to show on which counts the damages were assessed, a motion in arrest will lie. *Massucco v. Tomassi*, 186.

A judgment entered by the clerk of the county court on appeal from the disallowance of a claim against a decedent's estate by commissioners appointed by the probate court *held* to be in accordance with the order of court. *Nicholas v. Nicholas' Est.*, 242.

Failure to file affidavit left with the clerk showing noncompliance with order, and so authorizing judgment, *held* no ground for vacating judgment. *Ibid.*

After judgment and decision of county court on appeal from probate court is certified to the latter, pursuant to V. S. 2599, *held* that the county court has no further jurisdiction of the matter. *Ibid.*

Taxing costs without notice is no ground for vacating the judgment. *Ibid.*

The questions reached by a motion in arrest of judgment are those apparent on the face of the strict record only, and do not include a matter disclosed only by the evidence. *Morgan v. Hendrick*, 284; and *Hubbard v. Rutland R. R. Co.*, 462.

Judgments on confession without antecedent process have no basis other than the statute, and a compliance therewith is necessary to their validity, and the provisions authorizing them are strictly construed. *Mason v. Ward*, 290.

A judgment on confession made without the request or consent of the creditor and at the instance of the debtor alone is invalid unless ratified or accepted by the creditor. *Ibid.*

V. S. 1048, notwithstanding V. S. 1690, *held* not to compel a creditor to file a specification on the debtor confessing judgment so as to authorize the rendition of a judgment. *Ibid.*

Judgment of conviction in a prosecution for poisoning certain colts *held* conclusive of facts there determined, in a subsequent prosecution for another offence. *State v. Sargood*, 412.

The general rule that the determination of an issue of fact in a criminal case is conclusive thereof in a subsequent criminal proceeding between the same parties, does not apply where the measure of proof required in the adjudged case was not so great as that required in the case on trial. *State v. Sargood*, 415.

The rule that the determination of an issue of fact is conclusive proof in a subsequent proceeding between the same parties *held* not to apply to a prosecution for perjury. *Ibid.*

Statement of what may be considered on motion in arrest of judgment for defects in verdict. *Hubbard v. Rutland Railroad Co.*, 462.

JUSTICE OF THE PEACE.

See "NEW TRIAL."

LANDLORD AND TENANT.

See "PLEADING" § 2.

§ 1. Creation and Existence of the Relation.

Under the ordinary contract for carrying on a farm "at the halves," the parties are tenants in common of the products of the farm, and

the relation of landlord and tenant does not exist. *Mead v. Owen*, 273.

Under an agreement between plaintiff and defendant, the relation of landlord and tenant *held* not to exist, but that defendant's occupancy of a house was a mere incident of his carrying on the farm, and that hence "justice ejectment," under V. S. 1560 would not lie against him to recover possession of the house. *Ibid*.

The breaking of a window due to defect in the construction of a window-frame *held* a part of the ordinary wear, within the covenant as to the condition in which the building should be left. *Drouin v. Wilson*, 335.

The age, class, and general condition of the leased property when taken are to be considered in determining the liability of the tenant under his covenants. *Ibid*.

The relation between the tenant of demised premises and the grantee of the reversion is that of landlord and tenant, with all the rights and remedies incident to that relation, regardless of attornment. *Quinn v. Valiquette*, 434.

§ 2. Leases and Agreements in General.

There is a material difference between a covenant for a renewal of a lease and one for an extension of the term at the option of the lessee. The former is a mere executory contract for a lease thereafter to be executed. The latter makes the lease, at the option of the lessee, a present demise for the combined periods of the term certain and the agreed extension. *Quinn v. Valiquette*, 434.

The term of a lease *held* extended under an option by the tenant holding over. *Ibid*.

LIMITATION OF ACTIONS.

Where decedent accepted the provisions of his wife's will by which he was given the interest on certain notes held by her against him for life, such bequest operated to suspend the running of the Statute of Limitations for that period. *Church's Est. v. Church's Est.*, 228.

In view of V. S. 1987-1990, 1992, an action against an executor to recover penalties under V. S. 2357-2359 *held* barred by V. S. 1990, if not brought within four years after the commission of the offence, even though plaintiff, because of the executor's fraud, did not know of the offence until within the period of limitation. *Richardson v. Fletcher*, 510.

- An employee *held* not precluded from recovery by unnecessarily assuming a perilous position where it did not contribute to his injuries. *Kiley v. Rutland R. R. Co.*, 536.
- Rule of a railroad company considered, and *held* not to make a conductor guilty of contributory negligence as matter of law in not inspecting cars on the trip like a car inspector. *Ibid.*
- Car inspectors and conductors are not fellow servants. *Ibid.*
- Statement as to burden of proof as to negligence, and presumption of sufficiency of ladders on a car, where the ladder gave way as a conductor was climbing it. *Ibid.*
- The fact that the duties of trainmen require them to mount moving cars is recognized by the statute that requires cars to be equipped with end ladders. *Ibid.*

MORTGAGES.

See "TRUSTS."

§ 1. Rights and Liabilities of Parties.

- A conveyance conditioned for the support of a grantor will be treated as a mortgage, whatever the form in which the support is to be furnished; and upon breach by the grantee, equity may grant relief by foreclosing and extinguishing his rights under the conveyance. *Abbott v. Sanders*, 179.
- A second mortgagee taking an assignment of the first mortgage *held* to have the right to foreclose such mortgage, notwithstanding certain contracts in force between the second mortgagee and the mortgagor relating to the property. *Davenport v. Davenport*, 400.

§ 2. Foreclosure.

- In an action by a grantor to foreclose a deed conditioned for her support, an offer to do equity *held*, in the circumstances, not necessary. *Abbott v. Sanders*, 179.
- The prayer prescribed in the statutory form for a petition to foreclose a real estate mortgage is sufficient to warrant a decree shortening the usual time of redemption, and the reception of evidence bearing on that question. *Davenport v. Davenport*, 400.

MUNICIPAL CORPORATIONS.

See "SCHOOLS AND SCHOOL DISTRICTS."

MOTIONS.

In arrest of judgment, see "APPEAL AND ERROR" §§ 3, 4; "JUDGMENTS"; "NEW TRIAL"; "PLEADING" § 4.

NEGLIGENCE.

See "CARRIERS" § 1; "EVIDENCE" § 9; "MASTER AND SERVANT" § 1; "PHYSICIANS AND SURGEONS"; "TORTS."

Where a company was shown to have been *prima facie* negligent held that it can escape liability only by showing contributory negligence of, or assumption of risk by, plaintiff. *Drown v. New England Telephone & Telegraph Co.*, 1.

Defendant held negligent in driving his horse so as to pass a car at a point where plaintiff, who was working in a street, might be injured. *Fertel v. Peck*, 351.

Plaintiff, who was injured while working in a street by the alleged negligent driving of defendant's team, held not himself negligent as matter of law. *Ibid.*

In an action for injuries to plaintiff by the alleged negligent driving of defendant's team, the court did not err in refusing an instruction that it was plaintiff's duty to be on the alert for approaching teams, considering all conditions. *Ibid.*

NEW TRIAL.

A verified petition to the county court to set aside a default judgment rendered by a justice held sufficient as an affidavit of defence. *Collins v. Farley*, 144.

In a breach of promise suit, held error to overrule, *pro forma*, defendant's motion to set aside the verdict as against the weight of evidence and excessive. *Massucco v. Tomassi*, 186.

In a criminal prosecution, a new trial will not be granted for newly discovered evidence consisting of an affidavit of accused's former wife, who subsequent to his conviction had obtained a divorce and thus become a competent witness. *State v. Sargood*, 412.

In a prosecution for attempting to poison certain persons, a new trial will not be granted for newly discovered evidence in contradiction of evidence introduced by the State, where the defence could reasonably have expected the State to introduce such evidence, and the desirability of discrediting it could not have been overlooked in the ordinary preparation of the defence. *Ibid.*

Defendant *held* not entitled to have considered a certain affidavit on petition for a new trial in a bastardy proceeding. *Reynolds v. Hassam*, 501.

A petition for a new trial in a bastardy proceeding, unsupported by the affidavit of defendant's counsel, *held* insufficient. *Ibid*.

NOTICE.

Possession of real estate is notice to the world of whatever title, legal or equitable, the one in possession may have. *Quinn v. Valiquette*, 334.

NUISANCE.

When equity will grant relief for injuries resulting from a private nuisance stated. *Royce v. Carpenter*, 37.

OFFICERS.

See "FALSE IMPRISONMENT."

An officer cannot justify under a returnable process unless he shows its return. *Wright v. Templeton*, 358.

An officer arresting one under a warrant commanding him to do so, and to bring him forthwith before the subscribing justice, must take him before the justice as commanded. *Ibid*.

PAUPERS.

Under V. S. 3171, 3174, whether a person is poor and in need of assistance does not depend alone on the amount and value of his property, but on the exigencies of his situation. *Town of Ripton v. Town of Brandon*, 234.

The determination that a person is poor and in need of assistance, made by the overseer of the poor of the town furnishing such assistance, does not bind the town ultimately liable for the support of such person should he become a pauper, when sued by the former town for reimbursement. *Ibid*.

PERJURY.

See "JUDGMENTS."

In a prosecution for perjury, indictment following the statutory form *held* sufficient. *State v. Sargood*, 415.

Knowledge of the materiality of the false statements *held* not an element of the crime of perjury. *Ibid.*

Certain statements made before the grand jury *held* material to the issue, so that perjury could be predicated thereon. *Ibid.*

The record of the conviction of a crime is not conclusive evidence against the respondent that he committed it, in his subsequent prosecution for perjury in testifying on such former trial that he was innocent of that crime. *Ibid.*

Quære, whether an acquittal of a crime is a conclusive adjudication in the respondent's favor in a subsequent prosecution for perjury in swearing to his innocence on the former trial. *Ibid.*

PHOTOGRAPHS.

See "EVIDENCE" § 6.

PHYSICIANS AND SURGEONS.

See "APPEAL AND ERROR" § 4.

In an action against a physician for malpractice, plaintiff had the right to call the physician as a witness and show by him that he was paid a yearly salary by plaintiff's employer to treat the employees. *Sheldon v. Wright*, 298.

In an action against a physician for malpractice, evidence that another physician had rendered certain services in the case after defendant had retired *held* admissible as a part of the history of the case. *Ibid.*

In an action against a physician for malpractice, evidence as to defendant's mode of treatment of like cases during his term of practice *held* properly excluded. *Ibid.*

In an action against a physician for malpractice, a requested instruction as to the evidence to be considered *held* properly refused. *Ibid.*

A person holding himself out to the public as a physician and surgeon is bound to have and exercise such skill as physicians and surgeons in the same general neighborhood in the same general line of practice ordinarily have and exercise in like cases. *Ibid.*

The phrase "the same general neighborhood" as used in defining the skill required of a physician, explained. *Ibid.*

In an action against a physician for malpractice, *held* not error to refuse a charge that certain evidence alone was no evidence of defendant's negligence. *Ibid.*

In an action against a physician for malpractice, a charge *held* a sufficient statement of the rule that the negligence or lack of skill of a physician is not to be tested by the result of the treatment. *Ibid.*

There cannot be a recovery for malpractice in the case of a surgical operation without medical expert testimony tending to show lack of the requisite skill and care on defendant's part. *Ibid.*

In an action against a physician for malpractice, there is no presumption of law in the nature of evidence that the defendant had and exercised the requisite care and diligence, nor that he did his duty. *Ibid.*

In an action against a physician for malpractice, there is no presumption of defendant's negligence, and the burden of showing it is on plaintiff. *Ibid.*

PLEADING.

See "ACTION"; "CONSTITUTIONAL LAW" § 4; "DAMAGES"; "EVIDENCE" §§ 3, 6; "INDICTMENT AND INFORMATION."

§ 1. Form and Allegations in General.

A pleader need not affirmatively allege what is necessarily implied in what he does allege. *Drown v. New England Telephone & Telegraph Co.*, 1.

Any fact material to the orator's case that is presumably within the personal knowledge of the defendant, and presumably not within that of the orator, is well pleaded in a bill in equity by an averment thereof on information and belief. *Watkins v. Childs*, 99.

A bill in equity by riparian owners to restrain the unlawful obstruction of a water course need not allege that the resulting conditions are dangerous to health. *Cloyes v. Middlebury Electric Co.*, 109.

In session proceedings the strict rules of the common law for the construction of pleadings are not applied, but, where it will work neither surprise nor harm, such pleadings are construed liberally, with a view to substantial justice. *Collins v. Farley*, 144.

In session proceedings, if a pleading is capable of two meanings, one of which will defeat and the other sustain it, this will be taken and not that. *Ibid.*

In a breach of promise suit, a failure to allege a right of action in Italy, where the promise was made, was to be performed, and was broken, *held* not to go to the jurisdiction, but only to the sufficiency of the declaration. *Massucco v. Tomassi*, 186.

An omission in a declaration to lay the action in the county under a *vide licet* held not to affect the court's jurisdiction to try the case. *Ibid.*

In order to recover on an accident insurance policy, plaintiff must show that the cause of the accident was the cause alleged in the declaration. *Ward's Admr. v. Ins. Co.*, 321.

A bill in chancery does not sufficiently charge that a transaction is fraudulent by merely characterizing it as such, without alleging that which makes it fraudulent. *Quinn v. Valquette*, 434.

The technical accuracy required in common law pleadings is not essential to pleadings in county court on appeal from the decision of the probate court on a petition there presented. *In re Harriet C. Peck's Will*, 469.

§ 2. Pleas and Replications.

The highest degree of certainty is required in a plea to the jurisdiction, and all defects therein may be reached by a general demurrer. *U. S. v. Fid. & Guaranty Co.*, 84.

A plea to the jurisdiction must negative every fact from which jurisdiction may be presumed. *Ibid.*

A plea to the jurisdiction can derive no help from the writ or declaration unless referred to in such a way as to become a part of the plea; but the writ or declaration may always be considered against such plea. *Ibid.*

Where the fact relied on as the gist of defence is but the consequence of another fact, or where one is a necessary inducement to another, both may be pleaded without making the plea double. *Robinson v. St. J. & L. C. R. R. Co.*, 129.

Though the facts alleged in a plea are multifarious, if they all constitute one defence and require but one answer, there is no duplicity. *Ibid.*

Though the facts alleged in a plea disclose two defences, if they are so alleged as to show that only one defence is relied on, the plea is not double. *Ibid.*

In an action for personal injuries through negligence, certain pleas held not double. *Ibid.*

Pleas based on deeds and professing to answer the whole declaration, but from which it appeared that the rights conferred by the deeds ended prior to the commencement of the action, held to be bad where trespasses were alleged between a given date and the bringing of the suit. *Lee v. Follensby*, 182.

A plea, in an action of covenant on a lease, *held* a plea of *non fregit conventionem*, and not a plea of full performance. *Drouin v. Wilson*, 335.

Though a plea of *non fregit conventionem*, to an action of covenant is bad, it is aided after verdict. *Ibid.*

A plea of full performance to a declaration in covenant admits all matters well alleged and casts on defendant the burden of proving performance. *Ibid.*

A plea *held* argumentatively to allege delivery of a deed of release, and to be sufficient on demurrer to the replication, notwithstanding argumentativeness and alleged duplicity. *Dunlevy v. Fenton*, 505.

A plea which in effect denies the existence of the claim it opposes is defective as a plea in confession and avoidance. *Ibid.*

A plea setting up in reply a different contract from the one alleged is bad, as amounting merely to the general issue. *Ibid.*

A replication *held* to show that an alleged deed of release set up in a plea was never effective, and not to show color sufficient to make the replication good on demurrer. *Ibid.*

A plea in confession and avoidance must contain at least an implied admission that the allegations sought to be avoided are true. *Ibid.*

§ 3. Demurrer.

Where there is a demurrer to the whole bill in equity, and there is any relief to which the orator is entitled on the case stated, the demurrer falls. *Watkins v. Childs*, 99.

On demurrer to a bill in equity there is an essential distinction between an allegation of the bill of information and belief, and an allegation of fact on information and belief. In the one case the demurrer admits only that the orator is so informed and believes. In the other, if the allegation is well pleaded in that form, the admission is that the fact is as pleaded. *Ibid.*; and *Quinn v. Valiquette*, 434.

In a suit in equity, the fact that the orators have not established their right at law is not ground for demurrer. *Cloyes v. Middlebury Electric Co.*, 109.

Where, in trespass *quare clausum*, plaintiff craved oyer of deeds pleaded in defence with profert, but on their being read demurred without reciting them, the deeds were not within the scope of the demurrer, and points depending on their contents will not be considered. *Lee v. Follensby*, 182.

A demurrer to a bill in chancery does not admit what the bill merely alleges that the orator is informed and believes. *Quinn v. Valquette*, 434.

Rule governing the construction of equity pleadings on demurrer stated. *Ibid.*

On demurrer to a bill to remove, as a cloud on the title, an extension of a lease, *held* it could not be taken from the allegations that the extension was not made when it purported to be. *Ibid.*

On demurrer, a bill in equity construed as showing that a lease contained a provision for an extension of the term, rather than for renewal of the lease. *Ibid.*

General demurrers that together challenge all the counts of a declaration, amount to a separate demurrer to each count. *State v. Peet*, 449.

A special demurrer reaches all the preceding pleadings, but has only the force of a general demurrer as to pleadings prior to the one specially challenged. *Dunlevy v. Fenton*, 505.

§ 4. Motions.

Where a party makes a motion addressed to the discretion of the court, he has a right to have the court exercise its judgment and discretion in disposing of it. *Massucco v. Tomassi*, 186.

A motion in arrest of judgment for that the counts in the declaration are not for the same cause of action, is not sustainable. *Ibid.*

A motion to dismiss for lack of proper service of the writ should specify in what respect the writ is defective. *Thibault v. Conn. Valley Lumber Co.*, 333.

POLICE POWER.

See "COMMERCE."

Where the subjects on which the police power of a state is to be exerted are local or limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them; but when they are national in character, and require uniformity of regulation affecting all the states alike, the power of Congress is exclusive. *State v. Peet*, 449.

That class of subjects which requires uniformity of regulation affecting all the states alike, includes the purchase, transportation, and exchange of commodities, and intercourse for the purpose of trade in any and all forms. *Ibid.*

The provisions of No. 182, Acts 1906, making it punishable to keep with intent to ship out of the State for food purposes the flesh of a calf that was less than four weeks old or weighed less than 50 pounds dressed weight, when killed, *held* not within the State's police power. *Ibid.*

POSSESSION.

See "NOTICE."

POWERS.

See "EXECUTORS AND ADMINISTRATORS."

PRESCRIPTION.

See "WATER AND WATER COURSES."

PRINCIPAL AND AGENT.

See "INSURANCE" § 1.

§ 1. The Relation.

An appointment as arbitrator and agent to settle differences with another occupying a house on a farm *held* not to carry with it authority to extend the time within which the house might be occupied. *Mead v. Owen*, 273.

§ 2. Mutual Rights, Duties, and Liabilities.

Where defendant had possession and management of testatrix's estate, and was her trusted adviser, his relation to her was confidential, and in order to sustain the validity of her assignments to him, he must show that she was mentally competent and acted without undue influence. *Hobart's Admr. v. Vail*, 152.

Where the validity of assignments executed by testatrix is questioned, the finding of the master that she was in possession of her faculties, and that the transaction was fully explained to her, is a finding that she understood the nature and effect of the transaction. *Ibid.*

Where the validity of assignments is questioned on the ground that the relation between the parties was confidential, a certain finding of the master *held* equivalent to a finding that the transaction was not the result of undue influence. *Ibid.*

A gift to defendant by testatrix *held* valid. *Ibid.*

PROBATE COURT.

See "EQUITY" § 1; "JUDGMENTS"; "WILLS."

PROCESS.

See "ABATEMENT"; "MOTIONS"; "OFFICERS."

QUIETING TITLE.

Under the facts, *held* that a bill in equity to remove a cloud from the title would not be entertained, but the party would be left to his remedy at law. *Quinn v. Valiquette*, 434.

A bill in equity to remove a cloud from the title is addressed to the discretion of the court. *Ibid.*

RAILROADS.

See "CARRIERS" § 1; "CONSTITUTIONAL LAW" §§ 1, 5; "EMINENT DOMAIN"; "EVIDENCE" § 4; "MASTER AND SERVANT" § 1; STATUTES, CONSTRUCTION OF." Setting fires, see "TRIAL" § 3; "EVIDENCE" §§ 3, 9.

A railroad locating its tracks across a pasture owes a tenant by sufferance no duty to construct suitable farm crossings. *Marsh v. Rutland R. R. Co.*, 397.

RELEASE.

In an action against a railroad company for injuries through its negligence, defendant *held* entitled to plead in bar of plaintiff's action a release given by him to an express company of which he was messenger. *Robinson v. St. J. & L. C. R. R. Co.*, 129.

The right of a person to plead in bar of a cause of action a release obtained in his behalf by a stranger to the cause of action discussed. *Ibid.*

SCHOOLS AND SCHOOL DISTRICTS.

See "INTEREST"; "WILLS."

A provision of the charter of a school district *held* to mean that the district should receive the same share of income from bequests that it would, if not incorporated by special act. *North Troy Graded School Dist. v. Town of Troy*, 16.

A town school district is a corporate body by implication. *Ibid.*

SEARCHES AND SEIZURES.

See "CONSTITUTIONAL LAW" § 6.

SHERIFFS AND CONSTABLES.

See "OFFICERS."

SPECIFIC PERFORMANCE.

Where a case for specific performance has been made out in every respect except that the bill fails to show the orator ready to perform, relief will not be denied without an opportunity to the orator to move to amend his bill. *Wilkins v. Somerville*, 48.

STATUTES, CONSTRUCTION OF.

See "TAXATION."

The repeal of statutes by implication, and the implied destruction of vested rights, are alike unfavored in law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. *U. S. v. U. S. Fidelity & Guaranty Co.*, 84. So much of V. S. 5206, 5210, as required imprisonment in the house of correction in cases of conviction for being found intoxicated, is repealed by § 8, No. 200, Acts 1906, providing that all imprisonments for such offences shall be in the county jail. *In re Bowers*, 175.

The words "null and void" in the statute against fraudulent conveyances, V. S. 4965, mean *voidable* only. *Tudor v. Tudor*, 220. It is a rule of construction that, if a statute gives a new remedy in a particular case, this shall not extend to alter the common law in any other case. *State v. Wilson*, 249.

The common law of misprision of felony is in force in this State notwithstanding V. S. 4883. *Ibid.*

V. S. 1048, notwithstanding V. S. 1690, held not to compel a creditor to file a specification on the debtor confessing judgment, so as to authorize the rendition of a judgment. *Mason v. Ward*, 290.

Statutes authorizing the rendition of judgment by confession are to be strictly construed. *Ibid.*

Even if No. 117, Acts 1906, requiring certain corporations to pay their employees weekly in lawful money, did include corporations that it should not, it would not thereby be invalidated as to a railroad

corporation in respect of which it was otherwise valid. *Lawrence v. Rutland R. R. Co.*, 370.

The purpose of a statute, whatever its language, must be determined by its natural effect. *State v. Peet*, 449.

A statute using general words will not be construed to have extra-territorial effect when to do so would render it unconstitutional, unless the words clearly indicate that intent. *Ibid.*

A statute may be void in part only. *Ibid.*

An absurd purpose is not to be attributed to the Legislature, and a construction that leads to an absurd purpose must always, if possible, be avoided. *In re Alice Howard's Est.*, 489.

STATUTES CONSTRUED.

Acts 1904, No. 30. (Collateral inheritance tax). *In re Howard's Est.*, 489.

Acts 1904, No. 130. (Game law. Dogs running at large). *State v. Zonetti*, 348.

Acts 1904, No. 60. (Husband and wife as witnesses). *Mead v. Owen*, 273.

Acts 1896, No. 40. (Construction of will by court of equity). *Hall v. Lawton*, 535.

Acts 1906, No. 46. (Collateral inheritance tax). *In re Howard's Est.*, 489.

Acts 1906, No. 75. (Corporations, production of books. Contempt). *In re Consolidated Rendering Co.*, 55.

Acts 1906, No. 117. (Weekly payment law). *Lawrence v. R. Co.*, 370.

Acts 1906, No. 200. (Commitments to county jail). *In re Bowers*, 175.

Acts 1906, No. 182. (Sale of diseased and immature animals for meat). *State v. Peet*, 449.

V. S. 480-486. (Collection of taxes through treasurer). *Town of Brookfield v. Bigelow*, 428.

V. S. 1048. (Confession judgments). *Mason v. Ward*, 290.

V. S. 1560. ("Justice Ejectment"). *Mead v. Owen*, 273.

V. S. 1610. (Habeas Corpus in punishments for contempt). *In re Consolidated Rendering Co.*, 55.

V. S. 1625-1626. (Certiorari and Exceptions). *In re Consolidated Rendering Co.*, 55.

V. S. 1667. (New Trial, Fraud, Accident or Mistake). *Collins v. Farley*, 144.

V. S. 1680. (Restricting costs). *Massucco v. Tomassi*, 186.

- V. S. 1690. (Specifications on confession judgments). *Mason v. Ward*, 290.
- V. S. 1751. (Close jail certificate). *Flanders v. Mullin*, 124.
- V. S. 2356. (Probate of will, conclusiveness). *In re Peck's Est.*, 469.
- V. S. 2543. (Husband's Waiver of wife's will). *In re Peck's Est.*, 469.
- V. S. 2599. (Certifying judgment to probate court). *Nicholas v. Nicholas' Est.*, 242.
- V. S. 3171-3174. (Relief of Paupers). *Town of Ripton v. Town of Brandon*, 234.
- V. S. 3809. (Railroads, condemnation proceedings). *Post et al. v. R. Co.*, 551.
- V. S. 3814. (Railroads, condemnation proceedings). *Ibid.*
- V. S. 4883. (Misprision of treason). *State v. Wilson*, 249.
- V. S. 4965. (Fraudulent conveyances). *Tudor v. Tudor*, 220.
- V. S. 5206. (Commitment to house of correction). *In re Bowers*, 175.
- V. S. 5210. (Alternative sentence). *In re Bowers*, 175.
- V. S. 5417. (Perjury. Form of indictment). *State v. Sargood*, 415.

STREET RAILROADS.

See "CARRIERS" § 1.

TAXATION.

§ 1. Levy, Assessment and Collection.

Where a municipality collects its taxes through its treasurer, under V. S. 480-486, such treasurer, in the absence of any breach of duty, is chargeable only with money he has actually received. *Town of Brookfield v. Bigelow*, 428.

Under that system of collecting taxes, payments of taxes to the treasurer are voluntary, and he receives such payments merely as he receives money of the town from any other source. *Ibid.*

After such treasurer delivers the delinquent tax bills to the collector, the whole responsibility of collection rests on the latter. *Ibid.*

§ 2. Inheritance Tax.

Distributees of assets collected without this State and brought here by the administrator here appointed held taxable under No. 46, Acts 1896, and No. 30, Acts 1904. *In re Howard's Est.*, 489.

"Persons," in § 81, No. 30, Acts 1904, *held* to refer to the decedents and not to the beneficiaries mentioned therein. *Ibid.*

Under No. 46, Acts 1896, and No. 30, Acts 1904, a collateral inheritance tax based on the proceeds of a debt due from a nonresident *held* not defeated by §§ 82-85 of said Act of 1904. *Ibid.*

TENANCY IN COMMON.

See "LANDLORD AND TENANT" § 1.

TORTS.

Liability as joint tort feasons may arise from unintentional as well as from intentional wrongs. *Drown v. New England Telephone & Telegraph Co.*, 1.

It is not necessary to liability as joint tort feasons that there should have been actual concert of action, nor actual community of design. *Ibid.*

Where the negligence of a telephone company and an electric lighting company concur to produce an injury, *held* that they may be sued jointly. *Ibid.*

TOWNS.

See "PAUPERS"; "SCHOOLS AND SCHOOL DISTRICTS"; "TAXATION"; "TRUSTS."

TRESPASS.

See "PLEADING" §§ 2, 3.

TRIAL.

§ 1. Reception of Evidence.

If counsel wish evidence excluded, it must be objected to; and the occasional ejaculation of the word "exception" during the taking of testimony raises no question for the court's decision and reserves nothing. *Sheldon v. Wright*, 298.

On the trial of an action for malpractice, action of the court in allowing plaintiff's leg to be shown to the jury in a room adjoining the courtroom *held* not prejudicial. *Ibid.*

§ 2. Argument and Conduct of Counsel.

It is within the discretion of the trial court to allow plaintiff first to claim damages for pain and suffering in his closing argument to the jury. *Bolton v. Ovitt*, 362.

Improper statements by plaintiff's counsel in argument *held* to have been so promptly dealt with by the court and so fully retracted by counsel, as to rid the minds of the jury of any wrong impression. *Ibid.*

Whether a retraction by counsel of an improper remark to the jury will be held to have cured the mischief done, depends on the spirit and manner in which the retraction is made. *Douglas v. Carr*, 392.

Withdrawal of erroneous argument by plaintiff's attorney *held* not to cure the error. *Ibid.*

§ 3. Instructions to Jury.

In an action against a railroad company for setting a fire by sparks from its locomotives, an instruction *held* error for submitting a basis of recovery outside the pleadings. *Smith v. C. V. Ry. Co.*, 208.

In an action against a physician for malpractice, a charge *held* not objectionable as leaving the jury to determine the matter on their own judgment, in disregard of the medical expert evidence. *Sheldon v. Wright*, 298.

TROVER AND CONVERSION.

See "EVIDENCE" §§ 4, 6.

TRUSTS.

See "ESTOPPEL."

§ 1. Construction and Operation.

The acts of the selectmen of a town in making a division of income under a provision in a will *held* not a final determination of the ratio of division. *North Troy Graded School Dist. v. Town of Troy*, 16.

Where the selectmen of a town were appointed by a will to divide the income in a certain manner, a decree against one of them as to the manner of making the division is as effectual as a decree against all of them. *Ibid.*

A town that is made trustee under a will *held* a proper and necessary party to a suit in equity to construe the will and to secure a proper division of the income. *Ibid.*

Although generally matters of trust are cognizable only in equity, and a trustee cannot be sued at law by his beneficiary, a suit at law may sometimes be maintained by the beneficiary after the determination of the trust. *Snyder v. Parmalee*, 496.

A mortgagee, who transfers one of several notes secured by the same mortgage, thereafter holds the mortgage in trust for the holder of the note to the extent of his interest. *Ibid.*

Trust funds left with a trustee for investment may be recovered in an action at law,—the purpose of the trust being completed and the beneficiary entitled to the fund. *Ibid.*

Where a beneficiary has no claim superior to the ordinary creditors, and the trustee has, in violation of his trust, so disposed of the trust estate that it cannot be followed, the beneficiary's only remedy is at law against the trustee for breach of the trust. *Ibid.*

A mortgagor *held* liable in an action at law to one to whom he had transferred one of the mortgage notes, where he subsequently discharged the mortgage. *Ibid.*

Where a mortgagee transfers one of the notes secured, and subsequently discharges the mortgage, it is not necessary to recover in a suit against the mortgagee by the holder of the note, that the discharge should have been fraudulently made. *Ibid.*

A court of law is not precluded from passing on the facts constituting a trust, in order to determine whether the beneficiary is entitled to a remedy at law. *Ibid.*

UNITED STATES.

See "COURTS."

The United States, as a creditor, has no particular domicile, but possesses an ubiquity throughout the Union, and hence is domiciled in any state in whose courts it chooses to sue. *U. S. v. U. S. Fid. & Guaranty Co.*, 84.

VENDOR AND PURCHASER.

A purchaser in a bond for a deed of real estate is the equitable owner of the land, and an assignee of the bond takes the same estate. *Royce v. Carpenter*, 37.

Transfers of a bond for a deed of real estate *held* in equity to amount to a conveyance of the equitable title. *Ibid.*

Where a purchaser of land knew that his vendor deposited in escrow a deed conveying the land to another he stands in the same equity as his vendor. *Wilkins v. Somerville*, 48.

VESTED RIGHTS.

See "CONSTITUTIONAL LAW" § 2.

WARRANT.

See "OFFICERS."

WATERS AND WATER COURSES.

See "ESTOPPEL."

In a suit to restrain a lower millowner from backing water so as to injure the water power of an upper millowner, equity *held* authorized under the facts to grant relief. *Royce v. Carpenter*, 37.

Equity, in general, has jurisdiction of a suit to restrain the unlawful obstruction of a water course to the continuous injury of riparian proprietors having no adequate remedy at law. *Cloyes v. Middlebury Electric Co.*, 109.

A bill in equity by riparian owners to restrain the unlawful obstruction of a water course need not allege that the resulting conditions are dangerous to health. *Ibid.*

In a suit in equity by riparian owners to restrain the unlawful obstruction of a stream, it is not necessary that the landowner's right should be first established at law; their title to the riparian lands having been admitted. *Ibid.*

The channel of a water course having been altered at the cost of upper riparian proprietors so as to drain the upper riparian lands, a subsequent owner of a water power *held* estopped to obstruct the flow by a dam, to the injury of such upper riparian proprietors. *Ibid.*

The rights and duties of riparian owners in respect of an artificial channel may be the same as if it were the natural one. *Ibid.*

The artificial conditions created in a stream pursuant to contract among the riparian owners became the natural conditions, not prescriptively, nor by lapse of time, nor by force of the contract, as such, but by dedication and substitution. *Ibid.*

WEEKLY PAYMENT.

See "CONSTITUTIONAL LAW" §§ 1, 4, 5; "STATUTES, CONSTRUCTION OF."

WILLS.

See "APPEAL AND ERROR" § 4; "DEEDS"; "EQUITY" § 1; "EXECUTORS AND ADMINISTRATORS"; "GIFTS"; "LIMITATION OF ACTIONS"; "TRUSTS."

1 Construction.

Under the terms of a will, *held* that a school district created by special statute was entitled to one-half of the income of a trust fund. *North Troy Graded School Dist. v. Town of Troy*, 16.

One who accepts a devise or bequest, whether granted in lieu of a right or as a mere bounty, is bound to conform to the will and to accord full effect to all of its provisions. *Church's Exr. v. Church's Est.*, 228.

§ 2. Actions to Establish.

On a will contest, certain evidence *held* admissible as explaining, when taken in connection with the contested will, the reason for not making valuable bequests to contestants. *In re Rogers' Will*, 259.

Certain facts *held* to establish *prima facie* the presumption of undue influence in the execution of a will. *Ibid.*

On a will contest, there being proof establishing *prima facie* undue influence, the court erred in not charging that from such proof the law raised a presumption of undue influence to be overcome by counter proof. *Ibid.*

The doctrine of spoliation *held* inapplicable where testatrix requested a beneficiary in a subsequent will to retain a former will until he learned that the latter had been filed and then to destroy the former will, which he did. *Ibid.*

Under V. S. 2532, the probate court may extend the time for a husband to waive the provisions of his wife's will and take under the law. *In re Harriet Peck's Est.*, 469.

A wife's right to transfer real and personal property by will, conferred by V. S. 2346, not being dependent on the consent of her husband, the latter's right to waive, under V. S. 2543, is not affected by his failure to appeal from the probate of her will. *Ibid.*

Under V. S. 2356, a decree admitting a wife's will to probate, *held* conclusive only as to the execution of the will, and did not therefore preclude the husband from waiving the provisions of the will for his benefit. *Ibid.*

A husband's written notification to the probate court of his election to waive his wife's will is effectual without any action of the court. *Ibid.*

An election to take or not to take under a will may be by matter *in pais* as well as by matter of record. *Ibid.*

Where a husband filed his written election to waive his wife's will, under V. S. 2532, he could not be precluded from taking in opposition to the will, unless his acts and declarations rendered it inequitable to others for him to do so. *Ibid.*

Acts of a husband *held* not to estop him from waiving the provisions of his wife's will. *Ibid.*

WITNESSES.

See "APPEAL AND ERROR" § 2; "PHYSICIANS AND SURGEONS."

§ 1. Competency.

Certain evidence by a wife in an action of "justice ejectment" under V. S. 1650, to recover possession of a house, *held* not within No. 60, Acts 1904, forbidding a wife to testify against her husband as to conversations had by him with her or another person. *Mead v. Owen*, 273.

§ 2. Examination.

No. 75, Acts 1906, providing that a corporation may be required to produce its books and papers before certain tribunals under certain conditions, and providing for the manner of the service of the order to produce, and for punishment for contempt in case of non-compliance, and for an order and contempt proceedings thereunder, *held* not contrary to the Fourteenth Amendment of U. S. Constitution as requiring one to give evidence against himself. *In re Consolidated Rendering Co.*, 55.

Where a witness has been duly summoned, it is his duty to attend at the time and place named, and produce documentary evidence in his possession or control, if so ordered. *Ibid.*

If the privilege of a witness is not claimed by him in court and under oath, it is waived. *Ibid.*

The testimonial privilege on account of tendency to criminate, is purely personal, and can be claimed only by the witness himself in court and under oath. *Ibid.*

Whether documentary evidence ordered to be produced is relevant, or if produced would tend to criminate the witness, is for the court, and not for the witness, to determine. *Ibid.*

A witness cannot disobey an order to produce books and papers and still claim the privilege that they would tend to criminate him if produced. *Ibid.*

A grand jury is a part of the court, and any question of privilege can be raised before that body and reported to the court. *Ibid.*

Plaintiff, who on cross-examination was asked whether he did not make a different statement to defendant than that to which he had testified, *held* entitled to introduce a letter as bearing on what statement he did make. *Davis v. Farwell*, 166.

That testimony is not responsive to the question asked witness does not make is inadmissible. *Massucco v. Tomassi*, 186.

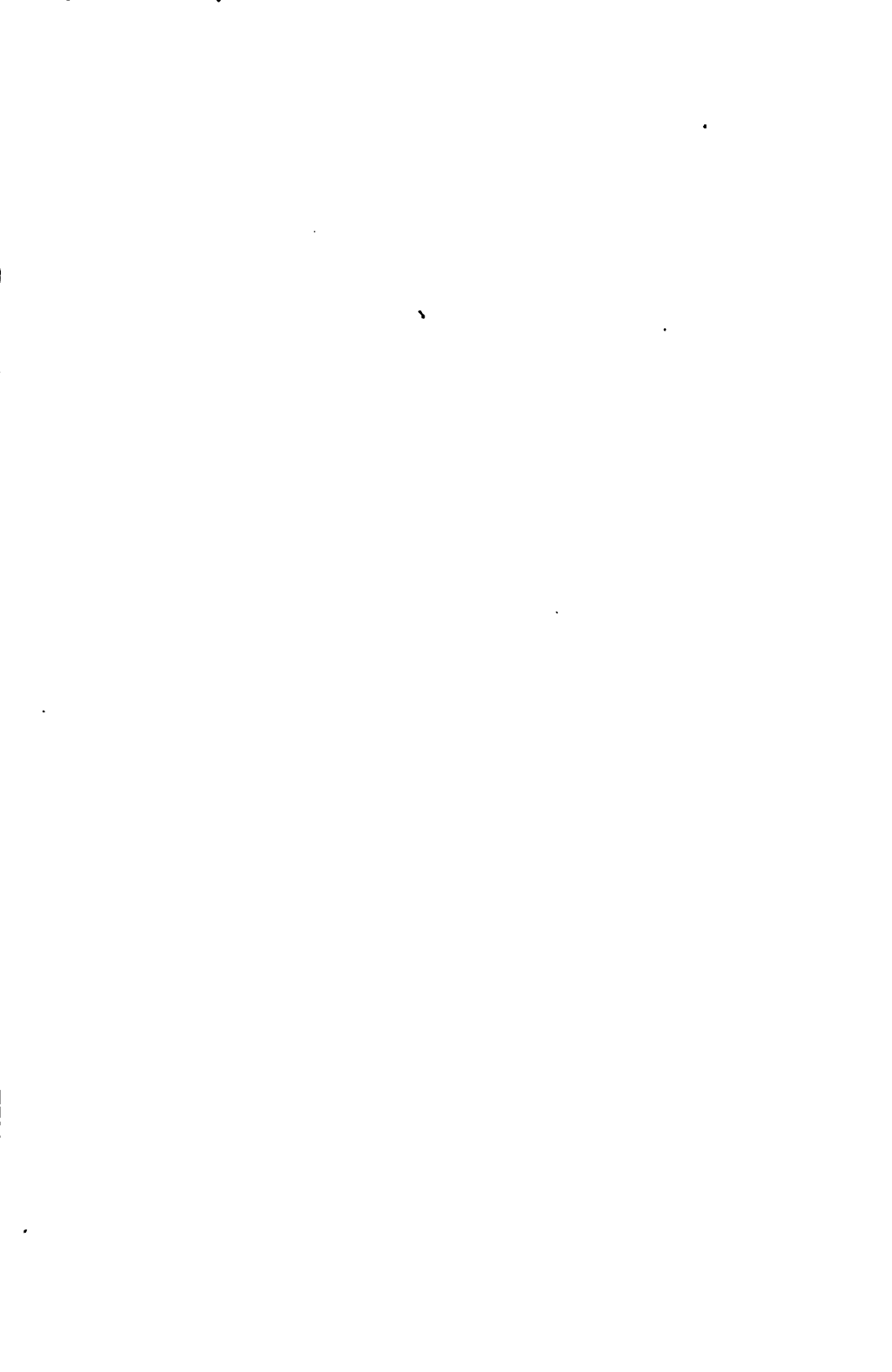
Certain cross-examination *held* proper. *Drouin v. Wilson*, 335.

In an action where the ownership of wood was the ultimate fact to be determined, a question asked defendant as a witness whether he or plaintiff owned the wood was properly excluded as calling for a conclusion of law. *Cate v. Fife & Child*, 404.

Scope of cross-examination of witnesses *held* within the discretion of the court. *Ibid.*

WRIT.

See "PLEADING" § 4.





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